

IDAHO COURT RULES

December 2013 Supplement

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of the 2013 Idaho Court Rules

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MICHIE

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IDAHO COURT

RULES

DECEMBER 2013 SUPPLEMENT

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PREFACE

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IDAHO RULES OF CIVIL PROCEDURE

Rule

1(d). Electronic signatures.

7(d). Declarations.

Rule 1(a). Scope of rules.

Cited in: Boise Mode, LLC v. Donahoe Pace & Partners Ltd., — Idaho —, 294 P.3d 1111 (2013).

Rule 1(d). Electronic signatures.

An electronic signature may be used on any document that is required or permitted under these rules and that is transmitted electronically, including a search or arrest warrant, a written certification or declaration under penalty of perjury, or an affidavit, and a notary's seal may be in electronic form. (Adopted June 20, 2013, effective July 1, 2013.)

Rule 4(a). Process — Summons — Issuance — Time limits.

JUDICIAL DECISIONS

ANALYSIS

Good Cause.

Time Limitation.

Good Cause.

The "excusable neglect" standard of Idaho Civ. Pro. Rule 6(b) does not apply to dismissal of an action under paragraph (2) of this rule. *Taylor v. Chamberlain*, — Idaho —, 302 P.3d 35 (2013).

Paragraph (2) imposes the burden of demonstrating good cause on the party who failed to effect timely service. To show good cause, such party must present sworn testimony by affidavit or otherwise setting forth facts that show good cause for failing to serve the summons and complaint timely. A party seeking relief based upon mistake, inadvertence, surprise, or excusable neglect must provide an affidavit or other sworn testimony that sets forth facts that are claimed to constitute such mistake, inadvertence, surprise, or excusable

neglect, so that the trial court can determine whether those facts meet the required standard for granting relief. *Taylor v. Chamberlain*, — Idaho —, 302 P.3d 35 (2013).

Time Limitation.

Six-month period for serving the summons and complaint under paragraph (2) commences running upon the first filing of a complaint naming as a defendant the party who raises the issue of untimely service. *Elliott v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012).

When a homebuyer sought to enforce a Utah judgment against a builder and filed an amended complaint naming the builder's son, it was not error to dismiss that complaint where the homebuyer did not serve the amended complaint on the son within six months of filing the complaint, and the homebuyer did not show good cause for failing to timely serve the complaint. *Grazer v. Jones*, — Idaho —, 294 P.3d 184 (2013).

Rule 4(d)(2). Service upon individuals.**JUDICIAL DECISIONS****ANALYSIS**

Apparent Authority.
Service Requirements.

Apparent Authority.

Apparent authority is created when a principal voluntarily places an agent in such a position that a reasonable person, conversant with the business usages and nature of the particular business, is justified in believing that the agent is acting pursuant to existing authority. However, apparent authority cannot be created by the acts or statements of the

alleged agent alone. *Elliott v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012).

Service Requirements.

Noncompliance with Idaho R. Civ. P. (4)(d)(4) and this rule is not excused, even though the requirements of due process are met; the manner of serving process cannot be ignored even when a defendant in some way receives such notice of the pending lawsuit as would satisfy the requirements of due process. *Elliott v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012).

Rule 4(d)(4). Service upon domestic or foreign corporations.**JUDICIAL DECISIONS****ANALYSIS**

Agent of Corporation.
Service Requirements.

Agent of Corporation.

A receptionist was not an authorized agent for service of process for a medical institute, as she was not an officer, managing or general agent, or any other agent authorized by appointment or by statute to receive service of process for the corporation. *Elliott v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012).

Service Requirements.

Noncompliance with I.R.C.P. (4)(d)(2) and this rule is not excused, even though the requirements of due process are met; the manner of serving process cannot be ignored even when a defendant in some way receives such notice of the pending lawsuit as would satisfy the requirements of due process. *Elliott v. Verska*, 152 Idaho 280, 271 P.3d 678 (2012).

Rule 4(i). General or special appearance.**JUDICIAL DECISIONS****Appearance.**

Failure to personally serve the father in a child protective act proceeding in accordance with § 16-1611 was of no effect in a termination of parental rights proceeding, because the father's voluntary appearance was

equivalent to service of summons and cured any defects in service, as it constituted voluntary submission to the personal jurisdiction of the court under subsection (1) of this rule.. *Idaho Dep't of Health & Welfare v. Doe (In re Doe)*, — Idaho —, 296 P.3d 381 (2013).

Rule 5(a). Service and filing of pleadings and other papers — Service — When required.**JUDICIAL DECISIONS****Service.**

Attaching a proposed answer and counterclaim to an affidavit supporting a motion to set aside, even when the motion and affidavit are properly filed and served, does not consti-

tute filing and service of the answer and counterclaim. The pleadings were not properly served and adequate notice of the answer and counterclaim was not given. *Cuevas v. Barraza*, 152 Idaho 890, 277 P.3d 337 (2012).

Rule 5(d). Filing.**JUDICIAL DECISIONS****Failure to File**

Attaching a proposed answer and counterclaim to an affidavit supporting a motion to set aside, even when the motion and affidavit are properly filed and served, does not consti-

tute filing and service of the answer and counterclaim. The pleadings were not properly served and adequate notice of the answer and counterclaim was not given. *Cuevas v. Barraza*, 152 Idaho 890, 277 P.3d 337 (2012).

Rule 5(e). Filing with the court.**JUDICIAL DECISIONS****Failure to File**

Attaching a proposed answer and counterclaim to an affidavit supporting a motion to set aside, even when the motion and affidavit are properly filed and served, does not consti-

tute filing and service of the answer and counterclaim. The pleadings were not properly served and adequate notice of the answer and counterclaim was not given. *Cuevas v. Barraza*, 152 Idaho 890, 277 P.3d 337 (2012).

Rule 6(a). Time computation.

Cited in: *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 291 P.3d 399 (2012).

Rule 6(b). Enlargement.

Cited in: *Taylor v. Chamberlain*, — Idaho —, 302 P.3d 35 (2013).

Rule 6(e)(1). Additional time after service by mail.

Cited in: *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 291 P.3d 399 (2012).

Rule 7(d). Declarations.

Whenever these rules require or permit a written statement to be made under oath or affirmation, such statement may be made as provided in Idaho Code Section 9-1406. An affidavit includes a written certification or declaration made as provided in Idaho Code section 9-1406. (Adopted April 29, 2013, effective July 1, 2013; amended June 20, 2013, effective July 1, 2013.)

Rule 8(a)(1). General rules of pleading — Claims for relief.**DECISIONS UNDER PRIOR RULE OR STATUTE****Issues Not Pleaded.**

Appeals court was not required to consider all of a property owner's claims on appeal

because the property owner had not properly raised those claims to the trial court. The only claim stated in the complaint was for breach

of contract, which the trial court ruled on. *Bettwieser v. New York Irrigation Dist.*, — Idaho —, 297 P.3d 1134 (2013).

Rule 9(b). Fraud, mistake, condition of the mind, violation of civil or constitutional rights.

JUDICIAL DECISIONS

Elements of Fraud.

Summary judgment was properly awarded to a decedent's former stepsons in an action by the personal representative of the decedent's estate to set aside two quitclaim deeds

because the representative did not proffer sufficient evidence addressing the nine prima facie elements of fraud, as required by this rule. *Quemada v. Arizmendez* (In re Estate of Ortega), 153 Idaho 609, 288 P.3d 826 (2012).

Rule 11(a)(1). Signing of pleadings, motions, and other papers; sanctions.

JUDICIAL DECISIONS

Sanctions.

Property owner acted reasonably on appeal in a zoning case, conceding arguments where a decision unfavorable to him was res judicata and not making frivolous arguments. Thus,

although the owner lacked standing under § 10-1202 because the zoning of his land had not been changed, the county was not entitled to attorney fees on appeal. *Martin v. Smith*, — Idaho —, 296 P.3d 367 (2013).

Rule 11(a)(2). Successive applications for orders or writs — Motions for reconsideration.

JUDICIAL DECISIONS

Motions for Reconsideration.

In an action for declaratory judgment to determine whether a road was public or private, the district court correctly concluded that, under paragraph (B), it could not strike an affidavit as untimely, since it was part of a motion to reconsider a summary judgment. Because appellant property owners filed their motion to reconsider two days after the final judgment was issued, it was timely and properly before the court. *Kepler-Fleenor v. Fre-*

mont County, 152 Idaho 207, 268 P.3d 1159 (2012).

Trial court did not err in considering a lessee's motion as both a Rule 59(e) motion to amend and a Rule 11(a)(2)(B) motion to reconsider. *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, — Idaho —, 294 P.3d 1111 (2013).

Cited in: *Rocky Mt. Power v. Jensen*, — Idaho —, 300 P.3d 1037 (2012).

Rule 15(b). Amendments to conform to the evidence.

JUDICIAL DECISIONS

Denial of Motion.

The buyers' motion to amend under Idaho R. Civ. P. 15(b) was properly denied where the buyers did not point to anything in the record indicating that the issue on which the amend-

ment was based, mutual mistake, was tried with the express or implied consent of both parties. *Bolognese v. Forte*, 153 Idaho 857, 292 P.3d 248 (2012).

Rule 15(c). Relation back of amendments.**JUDICIAL DECISIONS****Statute of Limitations.**

An amendment of a complaint to add a restaurant operator as a defendant in a slip and fall case, filed more than two years after the sustained injury, did not relate back to the time the original complaint was filed, within the two-year limitations period, where there was no evidence in the record that indicated

that, while the restaurant operator may have had knowledge of the plaintiff's injury, the operator had any knowledge of the suit before expiration of the limitations period. Knowledge that an injury had occurred is not the same as knowledge of the institution of a lawsuit. *Ketterling v. Burger King Corp.*, 152 Idaho 555, 272 P.3d 527 (2012).

Rule 23(a). Prerequisites to a class action.**JUDICIAL DECISIONS****Failure to Satisfy Conditions.**

Property owner who merely claimed that others were situated similarly, without providing further basis for a class action, was

properly denied certification of a class action. *Bettwieser v. New York Irrigation Dist.*, — Idaho —, 297 P.3d 1134 (2013).

Rule 23(b). Class actions maintainable.**JUDICIAL DECISIONS****Failure to Satisfy Conditions.**

Property owner in a dispute with the irrigation taxing district claimed that others were similarly situated, but did not provide

evidence showing that any of the factors in this rule applied to qualify as a class action. *Bettwieser v. New York Irrigation Dist.*, — Idaho —, 297 P.3d 1134 (2013).

Rule 25(a)(1). Substitution of parties — Death.**DECISIONS UNDER PRIOR RULE OR STATUTE****Improper Substitution.**

Client's malpractice claim sounded in tort and abated upon her death. Her breach of contract claim failed to state a claim upon which relief could be granted; therefore, the

personal representative's motion to substitute as plaintiff was improperly granted. *Bishop v. Owens*, 152 Idaho 617, 272 P.3d 1247 (2012).

Rule 26(e). Supplementation of responses.**JUDICIAL DECISIONS****No Abuse of Discretion.**

Landowners' expert was properly allowed to testify despite late disclosure; the court properly used its discretion to have the expert provide needed background information about well drilling, and strictly limited the expert's testimony so that he was not allowed to offer an opinion in the case. *Duspiva v. Fillmore*, — Idaho —, 293 P.3d 651 (2013).

Pursuant to paragraph (4) of this rule, the district court did not abuse its discretion in allowing an undisclosed witness to testify, because the witness was not an expert and was not offering an opinion, as he was testifying regarding facts as to which he had personal knowledge. *City of Meridian v. Petra Inc.*, — Idaho —, 299 P.3d 232 (2013).

Rule 32(b). Objections to admissibility.

JUDICIAL DECISIONS

Failure to Object.

Where the trial court received the evidence of a video deposition at a hearing specifically set for objections and the appellant did not raise any objections at that hearing, the trial court was within its discretion when it ruled that the appellant had waived any objections to the deposition testimony. Hansen v. Roberts, — Idaho —, 299 P.3d 781 (2013).

Rule 36(a). Requests for admission.

Cited in: Benz v. D. L. Evans Bank, 152 Idaho 215, 268 P.3d 1167 (2012).

Rule 36(b). Effect of admission.

Cited in: First Fed. Sav. Bank of Twin Falls v. Riedesel Eng'g, Inc. — Idaho —, 301 P.3d 632 (2012).

Rule 37(c). Expenses on failure to admit.

JUDICIAL DECISIONS

Attorneys' Fees.

In a lien priority dispute, the district court did not err in awarding the buyer attorney fees against the bank because the district court found that the matter requested to be admitted was true, that the bank had no justification for its failure to admit, and that the buyer was entitled to an award of attorney fees in the sum of \$9,915 as reasonable expenses incurred in proving the truth of the matter that should have been admitted. Benz v. D. L. Evans Bank, 152 Idaho 215, 268 P.3d 1167 (2012).

Cited in: Carrillo v. Boise Tire Co., 152 Idaho 741, 274 P.3d 1256 (2012).

Rule 40(d)(1). Disqualification without cause.

JUDICIAL DECISIONS

Vexatious Litigant Proceeding.

An administrative district judge has no duty to disqualify himself under this rule or Idaho R. Civ. P. 40(d)(2) in a vexatious litigant proceeding under Idaho Ct. Admin. R. 59, because the Idaho rules of civil procedure do not apply to such proceedings. Telford v. Nye, — Idaho —, 301 P.3d 264 (2013).

Rule 40(d)(2). Disqualification for cause.

JUDICIAL DECISIONS

ANALYSIS

Bias or Prejudice.
Denial of Motion to Disqualify.
Discretion of Court.
Objection.
Vexatious Litigant Proceeding.

Bias or Prejudice.

Judge's earlier, general comments about election contests and voter privacy were not directed against the concept of election contests or any of the parties in the present litigation over an election result. Therefore, the comments do not display favoritism or

antagonism as would be required for a judge to disqualify himself from the case. *Brannon v. City of Coeur D'Alene*, 153 Idaho 843, 292 P.3d 234 (2012).

Denial of Motion to Disqualify.

Trial judge was not required to disqualify himself, under paragraph (A) of this rule, for the limited purpose of hearing a Utah county's motion for new trial in a personal injury trial. His clerk's conduct in communicating with opposing party, outside the courtroom on matters not related to the case, could not be imputed to the judge under the Idaho Code of Judicial Conduct. *Athay v. Rich County*, 153 Idaho 815, 291 P.3d 1014 (2012).

Discretion of Court.

Whether a judge's involvement in a case reaches a point where disqualification from further participation in a defendant's case becomes necessary is left to the sound discretion of the judge himself. *Brannon v. City of*

Coeur D'Alene, 153 Idaho 843, 292 P.3d 234 (2012).

Objection.

Because the question of a recusal under this rule is committed to the discretion of the trial judge, absent some objection at trial, there is no decision by the trial court that an appellate court can review and no factual record from which grounds for disqualification can be discerned. *Minor Miracle Prods., LLC v. Starkey*, 152 Idaho 333, 271 P.3d 1189 (2012).

Vexatious Litigant Proceeding.

An administrative district judge has no duty to disqualify himself under Idaho R. Civ. P. 40(d)(1) or this rule in a vexatious litigant proceeding under Idaho Ct. Admin. R. 59, because the Idaho rules of civil procedure do not apply to such proceedings. *Telford v. Nye*, — Idaho —, 301 P.3d 264 (2013).

Cited in: *Indian Springs L.L.C. v. Andersen*, — Idaho —, 302 P.3d 333 (2012).

Rule 41(a)(2). Dismissal by order of court.

JUDICIAL DECISIONS

Discretion of Court.

Under this rule, dismissals are to be upon order of the court and upon such terms and conditions as the court deems proper. This provision is discretionary with the trial court both as to whether a dismissal should be allowed, as well as to the terms and conditions to be imposed, if allowed. The purpose of

the court's discretionary authority under this rule is to insure that the court pays due regard to the interests of both the plaintiff and defendant; dismissal of the plaintiff's action must not unfairly jeopardize the defendant's interests. *Peterson v. Private Wilderness, LLC*, 152 Idaho 691, 273 P.3d 1284 (2012).

Rule 45(g). Subpoena for a hearing or trial.

JUDICIAL DECISIONS

Cited in: *Brannon v. City of Coeur D'Alene*, 153 Idaho 843, 292 P.3d 234 (2012).

Rule 47(o). Notes by jurors — Juror notebooks.

RESEARCH REFERENCES

A.L.R. Propriety of juror's tests or experiments outside of court or jury room. 77 A.L.R.6th 251.

Rule 47(p). Taking documents and exhibits to jury room.**RESEARCH REFERENCES**

A.L.R. Propriety of juror's tests or experiments outside of court or jury room. 77 A.L.R.6th 251.

Rule 51(b). Rulings on objections — Final instructions and arguments.

Cited in: Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co., 153 Idaho 716, 291 P.3d 399 (2012).

Rule 52(a). Findings by the court — Effect.

Cited in: In re Doe, 152 Idaho 910, 277 P.3d 357 (2012); McCormick Int'l USA, Inc. v. Shore, 152 Idaho 920, 277 P.3d 367 (2012).

Rule 53(e)(3). Master's report in jury actions.**JUDICIAL DECISIONS****Information needed to consider factors.**

In a probate action, a personal representative was not entitled to attorney's fees under § 15-3-720 because, although his agreement with his attorney was for a lump sum, the attorney had to provide a memorandum of

costs specifying at least the total time provided for his work for a determination of reasonableness under I.R.C.P. 54(e)(3). In re Estates of Bailey, 153 Idaho 526, 284 P.3d 970 (2012).

Rule 54(a). Judgments — Definition — Form.**JUDICIAL DECISIONS****ANALYSIS**

Factors Considered.

Finality of Judgment.

Factors Considered.

Judgment NOV on a claim for breach of an express contract could not be upheld because the trial court granted the JNOV motion as to only one element of the cause of action, contrary to the requirements of this rule. Mosell Equities, LLC v. Berryhill & Co., — Idaho —, 297 P.3d 232 (2013).

Finality of Judgment.

Idaho court's judgment confirming a jury's verdict that a Chapter 7 debtor committed fraud, in conjunction with a contract he entered to build a house for two creditors, was a

final judgment, for bankruptcy purposes, even though the creditors appealed the court's order denying their request for attorney's fees and costs. Poole v. Davis (In re Davis), — Bankr. —, 2012 Bankr. LEXIS 4781 (Oct. 10, 2012).

Objection to the form of a divorce judgment did not extend the time for appeal from the magistrate court to the district court under Rule 83(e) because the objection was not a motion to alter or amend under Rule 59(e) but sought relief in the nature of a clerical correction under Rule 60(a). Although such a correction was made in an amended judgment, the time for appeal ran from the entry of the original judgment, which was final under former Rule 54(a) because it resolved all claims. Vierstra v. Vierstra, 153 Idaho 873, 292 P.3d 264 (2012).

Rule 54(b). Judgment upon multiple claims or involving multiple parties.

JUDICIAL DECISIONS

ANALYSIS

Appeal from Summary Judgment.
Attorney Fees.

Appeal from Summary Judgment.

Because appellate jurisdiction over an appeal from an interlocutory decision under this rule is limited to the rulings or orders certified by the district court, the appellate court may not consider, in an appeal from a partial summary judgment dismissing several causes of action, whether the remaining causes of action should be dismissed. *Taylor v. AIA*

Servs. Corp., 151 Idaho 552, 261 P.3d 829 (2011).

Attorney Fees.

Even though a judgment had been certified as final pursuant to this rule, because the certified judgment did not dispose of all of the parties' claims, an appellate court could not determine the prevailing party and could not award attorney fees. *Asbury Park, LLC v. Greenbriar Estate Homeowner's Ass'n*, 152 Idaho 338, 271 P.3d 1194 (2012).

Cited in: *Bach v. Dawson*, 152 Idaho 237, 268 P.3d 1189 (2012).

Rule 54(d)(1). Costs — Items allowed.

JUDICIAL DECISIONS

ANALYSIS

Discretionary Costs.
Findings of Costs.
In General.
Prevailing Party.
Specific Findings.

Discretionary Costs.

Discretionary costs were properly awarded to an insurer under this rule, based on the insured's conduct in pursuing a bad faith claim after refusing to produce the documentation necessary for the insurer to value its claim. *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 291 P.3d 399 (2012).

Findings of Costs.

Paragraph (D) permits costs, other than those as a matter of right, to be awarded in the district court's discretion after considering the necessity, exceptionalness, reasonableness, and interests of justice. Particular standards a court should consider in awarding costs include, but are not limited to, whether there was unnecessary duplication of work, whether there was an unnecessary waste of time, the frivolity of issues presented, and creation of unnecessary costs that could have been easily avoided. Most importantly, a court should explain why the circumstances of a case render it exceptional. *Hoagland v. Ada County*, — Idaho —, 303 P.3d 587 (2013).

In General.

The plain language of this rule restricts the cost of preparing exhibits to those "admitted in evidence." The restrictive nature of this language precludes awards for exhibits not admitted in evidence. *Hoagland v. Ada County*, — Idaho —, 303 P.3d 587 (2013).

Prevailing Party.

District court abused its discretion when it declined to find the employee to be the prevailing party where, although the employee received an award far smaller than that which he sought, he defeated the employer's counterclaim and the award that he did receive was for more than a nominal amount. *Oakes v. Boise Heart Clinic Physicians, PLLC*, 152 Idaho 540, 272 P.3d 512 (2012).

Since each claim in an action must be resolved before a court may determine the prevailing party, the identity of the prevailing party cannot be known until proceedings at the trial level are complete. *Steel Farms, Inc. v. Croft & Reed, Inc.*, — Idaho —, 297 P.3d 222 (2012).

Court's discretion as to prevailing party generally will not be disturbed. Prevailing party may be determined by examining the success of a defense as well as by the amount of damages awarded. *Hobson Fabricating Corp. v. SE/Z Constr., LLC*, — Idaho —, 294 P.3d 171 (2012).

Award of costs to an irrigation district in a resident's breach of contract action was proper because the district was manifestly

the prevailing party; further, the cost memorandum and the judgment complied with the Idaho Rules of Civil Procedure. *Bettwieser v. New York Irrigation Dist.*, — Idaho —, 297 P.3d 1134 (2013).

Specific Findings.

Trial court was not required by this rule to issue written findings in support of its deter-

mination that no party was a prevailing party in a multiclaim action in which a verdict was returned only in the plaintiffs' favor and only for one of their claims. *Poole v. Davis*, 153 Idaho 604, 288 P.3d 821 (2012).

Cited in: *Rammell v. State*, — Idaho —, 302 P.3d 9 (2012); *Old Cutters, Inc. v. City of Hailey (In re Old Cutters, Inc.)*, — Bankr. —, 2013 Bankr. LEXIS 1623 (Apr. 18, 2013)

Rule 54(d)(6). Objections to costs.

JUDICIAL DECISIONS

Timely Motion.

The 14-day objection period in this rule was extended by three days under Idaho R. Civ. P. 6(e)(1), when insurer served its motion for costs by overnight mail, and the period was

further extended by a day under Idaho R. Civ. P. 6(a), when the three-day extension ended on a Sunday. *Lakeland True Value Hardware, LLC v. Hartford Fire Ins. Co.*, 153 Idaho 716, 291 P.3d 399 (2012).

Rule 54(e)(1). Attorney fees.

JUDICIAL DECISIONS

Award Proper.

In a case in which plaintiffs initiated an action against governmental defendants to recover for the loss and destruction of elk that escaped from their ranch, the district court did not abuse its discretion by awarding attorney fees to defendants; as the non-prevailing parties, plaintiffs pursued their claims

without a reasonable basis in fact or law. *Rammell v. State*, — Idaho —, 302 P.3d 9 (2012).

Cited in: *Peterson v. Private Wilderness, LLC*, 152 Idaho 691, 273 P.3d 1284 (2012); *Old Cutters, Inc. v. City of Hailey (In re Old Cutters, Inc.)*, — Bankr. —, 2013 Bankr. LEXIS 1623 (Apr. 18, 2013).

Rule 54(e)(3). Amount of attorney fees.

JUDICIAL DECISIONS

ANALYSIS

Applicability of Factors.
Contractual Right.

Applicability of Factors.

Award of attorney fees would not be disturbed on review because the district court had considered the factors in this rule, as it found that the case was litigated for more than two years, that it involved more than a dozen vigorously contested pre-trial motions, that the trial lasted 59 days, that the construction manager's lead attorneys were experienced litigation attorneys, that their fees were consistent with similarly experienced attorneys in this jurisdiction, and that the

range of issues presented and defended was exhaustive, and often required both parties to work within confined time frames. *City of Meridian v. Petra Inc.*, — Idaho —, 299 P.3d 232 (2013).

Contractual Right.

In an architect's suit for uncompensated services, the district court did not abuse its discretion in awarding the architect \$48,740 in attorney's fees, as he was the prevailing party and his request for fees was based on the legal portions of his implied-in-fact contract. *Farrell v. Whiteman*, 152 Idaho 190, 268 P.3d 458 (2012).

Cited in: *Noak v. Idaho Dep't of Corr.*, 152 Idaho 305, 271 P.3d 703 (2012).

Rule 54(e)(4). Pleading — Default judgments.**JUDICIAL DECISIONS****Pleading.**

Idaho R. Civ. P. 54(e)(4) does not explicitly require the complaint to specify a fixed figure. Rather, with regard to the possibility that default judgment can be entered after the action is contested, the dollar amount requirement may be satisfied by a demand for the actual cost of attorney's fees. *Magleby v. Garn*, — Idaho —, 296 P.3d 400 (2013).

When materialmen obtained a default judgment

after almost two years of litigation in a lien foreclosure action, they were entitled to recover their actual attorney fees and costs, rather than being limited to the specific amount they had requested in the event of an uncontested action. A request in the pleading for actual fees and costs if the action were to be contested met the requirements of this rule. *Magleby v. Garn*, — Idaho —, 296 P.3d 400 (2013).

Rule 56(f). When affidavits are unavailable in summary judgment proceedings.**JUDICIAL DECISIONS****Construction**

This rule is intended to ensure that a non-moving party has adequate time to conduct necessary discovery, and it should be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding. Parties have a significant interest in the timely and economical resolution of

legal disputes, however, the legal standard governing a district court's exercise of discretion when deciding a Rule 56(f) motion permits consideration of the moving party's previous lack of diligence in pursuing discovery. *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, — Idaho —, 294 P.3d 1111 (2013).

Rule 59(a). New trial — Amendment of judgment — Grounds.**JUDICIAL DECISIONS**

Cited in: *Athay v. Rich County*, 153 Idaho 815, 291 P.3d 1014 (2012).

Brannon v. City of Coeur D'Alene, 153 Idaho 843, 292 P.3d 234 (2012).

Rule 59(b). Time for motion for new trial.

Cited in: *Athay v. Rich County*, 153 Idaho 815, 291 P.3d 1014 (2012).

Rule 59(e). Motion to alter or amend a judgment.**JUDICIAL DECISIONS****ANALYSIS**

Applicability.
Not reviewable.

Applicability.

Objection to the form of a divorce judgment did not extend the time for appeal from the magistrate court to the district court under Rule 83(e) because the objection was not a motion to alter or amend under Rule 59(e) but

sought relief in the nature of a clerical correction under Rule 60(a). Although such a correction was made in an amended judgment, the time for appeal ran from the entry of the original judgment, which was final under former Rule 54(a) because it resolved all claims. *Vierstra v. Vierstra*, 153 Idaho 873, 292 P.3d 264 (2012).

Not reviewable.

Because two issues in a water rights case

were first raised in a motion under this rule. Those issues were not preserved for review. *City of Pocatello v. State* (In re SRBA Case No. 39576), 152 Idaho 830, 275 P.3d 845 (2012).

Cited in: *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, — Idaho —, 294 P.3d 1111 (2013).

Rule 60(a). Relief from judgment or order — Clerical mistakes.

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Applicability.

Objection to the form of a divorce judgment did not extend the time for appeal from the magistrate court to the district court under Rule 83(e) because the objection was not a motion to alter or amend under Rule 59(e) but sought relief in the nature of a clerical correc-

tion under Rule 60(a). Although such a correction was made in an amended judgment, the time for appeal ran from the entry of the original judgment, which was final under former Rule 54(a) because it resolved all claims. *Vierstra v. Vierstra*, 153 Idaho 873, 292 P.3d 264 (2012).

Rule 60(b). Mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, grounds for relief from judgment or order.

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Criminal Case.

Because the dismissal of a felony conviction became final after the expiration of the time for appeal or affirmance of the dismissal on appeal, a district court's jurisdiction to amend the order expired at that time. Jurisdiction was not extended under I.C. § 37-2732 to hear a motion seeking reimbursement that was filed 10 months after the dismissal, and I.C.R.P. 60(b) and I.C.R. 35 did not apply.

Even assuming the district court had subject matter jurisdiction, it lacked personal jurisdiction over the nonparty agencies that collected, disbursed, or retained the monies paid. *State v. Peterson*, 153 Idaho 157, 280 P.3d 184 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 164 (Idaho June 22, 2012).

Cited in: *First Fed. Sav. Bank of Twin Falls v. Riedesel Eng'g, Inc.*, — Idaho —, 301 P.3d 632 (2012).

Rule 61. Harmless error.

JUDICIAL DECISIONS

ANALYSIS

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Even if a claims examiner's testimony might have confused the jury in an insurance payment dispute, any error in admitting the testimony was harmless because the jury instructions precisely set forth the policy language and explained the concepts at issue, thus curing any prejudice. *Lakeland True*

Value Hardware, LLC v. Hartford Fire Ins. Co., 153 Idaho 716, 291 P.3d 399 (2012).

Substantial Right.

Where there was no indication that in the court's analysis the district court relied on affidavits from two witnesses that potentially contained hearsay testimony, any error resulting from the district court's failure to strike the affidavits of the two witnesses did not affect the employee's substantial rights. *Arambarri v. Armstrong*, 152 Idaho 734, 274 P.3d 1249 (2012).

Rule 65(d). Form and scope of injunction or restraining order.**JUDICIAL DECISIONS****ANALYSIS**

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Scope.

Requirements.

Where operators of a shooting range fulfill all of the requirements of an injunction, the court cannot refuse to lift the injunction by adding a new requirement, not specified in the original injunction. *Hom v. Idaho Fish & Game Dep't (Citizens Against Range Expansion)*, 153 Idaho 630, 289 P.3d 32 (2012).

Scope.

In determining whether a particular act falls within the scope of an injunction's prohibition, particular emphasis must be given to the express terms of the order. An injunction does not prohibit those acts that are not within its terms, as reasonably construed. *Hom v. Idaho Fish & Game Dep't (Citizens Against Range Expansion)*, 153 Idaho 630, 289 P.3d 32 (2012).

Rule 75(c). Nonsummary proceedings — Commencement.**JUDICIAL DECISIONS****Court's Discretion.**

The district court has the authority to impose sanctions for failure to timely comply with a court order, but it also has the discre-

tion to not impose those sanctions once the order has been complied with. *Chavez v. Canyon County*, 152 Idaho 297, 271 P.3d 695 (2012).

Rule 83(a). Appeals from decisions of magistrates.

Cited in: *Vierstra v. Vierstra*, 153 Idaho 873, 292 P.3d 264 (2012).

Rule 83(e). Filing appeal.**JUDICIAL DECISIONS****Extension of Time.**

Objection to the form of a divorce judgment did not extend the time for appeal from the magistrate court to the district court under Rule 83(e) because the objection was not a motion to alter or amend under Rule 59(e) but sought relief in the nature of a clerical correc-

tion under Rule 60(a). Although such a correction was made in an amended judgment, the time for appeal ran from the entry of the original judgment, which was final under former Rule 54(a) because it resolved all claims. *Vierstra v. Vierstra*, 153 Idaho 873, 292 P.3d 264 (2012).

Rule 83(s). Effect of failure to comply with time limits.

Cited in: *Vierstra v. Vierstra*, 153 Idaho 873, 292 P.3d 264 (2012).

Rule 84(a). Judicial review of state agency and local government actions.**JUDICIAL DECISIONS****Applicability.**

This rule is inapplicable to legal challenges to an irrigation ditch owner's exercise of discretion regarding encroachments. Review of such a decision is not judicial review of an

agency's action. Rather, courts will be called upon to evaluate the ditch owner's exercise of discretion in some form of civil action. *Pioneer Irrigation Dist. v. City of Caldwell*, 153 Idaho 593, 288 P.3d 810 (2012).

Rule 84(e). Method and scope of review.**JUDICIAL DECISIONS****Tax Deed.**

Pursuant to § 63-1006, any person aggrieved by a county commissioners' decision to issue a tax deed can have the decision reviewed by the district court. The district court confines its review to the record from the county and can only reverse or modify the

commissioners' decision if substantial rights have been prejudiced. Upon appeal, the decision reached by the district court is examined by an appellate court only to consider whether the district court correctly decided the issues presented to it. *Chavez v. Canyon County*, 152 Idaho 297, 271 P.3d 695 (2012).

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IDAHO RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS.

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Admission of Evidence.

—Error.

— —Harmless.

In a grand theft case, even if a district court erred in admitting irrelevant evidence under Idaho R. Evid. 401 and Idaho R. Evid. 402, any error was harmless under Idaho R. Evid. 103 because the evidence of defendant's guilt

was extensive. A rational jury would have convicted defendant even without the admission of the evidence about what happened to an individual after the collapse of a business. *State v. Hill*, — Idaho —, 296 P.3d 412 (2012), review denied, — Idaho —, 2013 Ida. LEXIS 82 (Idaho Mar. 20, 2013).

Objection.

Appellant's broad, general objection that the testimony of an accident reconstructionist invaded the province of the jury was not a proper objection to preserve appellant's challenges to the testimony; the objection was not sufficiently specific under this rule. *Hansen v. Roberts*, — Idaho —, 299 P.3d 781 (2013).

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In a will contest, there was no error in declining to take judicial notice of affidavits and reports relied on during the testator's guardianship and conservatorship proceeding three months before the will was executed, which documents were offered to demonstrate

lack of testamentary capacity at the time of the will's execution. The documents 'constituted hearsay opinions of individuals regarding capacity and hearsay-within-hearsay declarations of the testator. *Wooden v. Martin* (In re Conway), 152 Idaho 933, 277 P.3d 380 (2012).

ARTICLE IV. RELEVANCY AND ITS LIMITS.

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Error Harmless.
Evidence Held Admissible.
Evidence Held Inadmissible.
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Error Harmless.

In a grand theft case, even if a district court erred in admitting irrelevant evidence under Idaho R. Evid. 401 and Idaho R. Evid. 402, any error was harmless under Idaho R. Evid. 103 because the evidence of defendant's guilt was extensive. A rational jury would have convicted defendant even without the admission of the evidence about what happened to an individual after the collapse of a business. *State v. Hill*, — Idaho —, 296 P.3d 412 (2012), review denied, — Idaho —, 2013 Ida. LEXIS 82 (Idaho Mar. 20, 2013).

Although an expert witness's testimony about defendant's high suggestibility and social anxiousness should have been admitted, as it was relevant to a determination of whether his statements were the subject of police coercion, because defendant's recollection of the events was never substantially altered to submit to the detective's suggested version of the events and defendant's statements were voluntary, the district court's selective exclusion of the expert's suggestibility testimony amounted to harmless error. *State v. Stone*, — Idaho —, 303 P.3d 636 (2013).

Evidence Held Admissible.

In a trial for lewd conduct with a six-year-

old child, character witnesses should have been allowed to testify regarding defendant's interactions with children and his trustworthiness with preteens. So long as specific incidents were not described, the witnesses' opinions were pertinent. However ' failure to admit the testimony was harmless error. *State v. Rothwell*, — Idaho —, 294 P.3d 1137 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 72 (Idaho Feb. 28, 2013).

Evidence Held Inadmissible.

It was error to admit evidence suggesting that defendant harassed a victim by positioning a lawn chair so that a picture of a smiley face with its tongue sticking out faced the victim's neighboring house because the evidence was not relevant. However, the error was harmless. *State v. Rothwell*, — Idaho —, 294 P.3d 1137 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 72 (Idaho Feb. 28, 2013).

Impeachment Evidence.

Evidence that a witness and defendant associated with each other, although members of different gangs, bore directly on a witness's credibility and was, therefore, relevant as impeachment evidence for the purpose of showing bias. Evidence that they were closely associated, and that their respective gang memberships were a component of that affiliation, was relevant. *State v. Thumm*, 153 Idaho 533, 285 P.3d 348 (2012).

Cited in: *State v. Critchfield*, 153 Idaho 680, 290 P.3d 1272 (2012).

RESEARCH REFERENCES

A.L.R. Admissibility of person's status as illegal alien in civil pretrial and trial proceedings. 79 A.L.R.6th 351.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

JUDICIAL DECISIONS

ANALYSIS

Evidence Relevant.
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Evidence Relevant.

The district court did not abuse its discretion in admitting evidence about the criminality of gangs under Idaho R. Evid. 403 and 404. Both the criminal conduct of a specific gang and the criminal conduct of gangs generally were relevant to proving motive, and the probative value of the evidence was not substantially outweighed by unfair prejudice. The testimony challenged was relevant in understanding defendant's purported motive to shoot the victim because of a seemingly harmless offense, wearing a red jersey in the wrong place. *State v. Almaraz*, — Idaho —, 301 P.3d 242 (2013).

Harmless Error.

In a grand theft case, even if a district court erred in admitting irrelevant evidence under Idaho R. Evid. 401 and Idaho R. Evid. 402, any error was harmless under Idaho R. Evid. 103 because the evidence of defendant's guilt was extensive. A rational jury would have convicted defendant even without the admis-

sion of the evidence about what happened to an individual after the collapse of a business. *State v. Hill*, — Idaho —, 296 P.3d 412 (2012), review denied, — Idaho —, 2013 Ida. LEXIS 82 (Idaho Mar. 20, 2013).

Although an expert witness's testimony about defendant's high suggestibility and social anxiousness should have been admitted, as it was relevant to a determination of whether his statements were the subject of police coercion, because defendant's recollection of the events was never substantially altered to submit to the detective's suggested version of the events and defendant's statements were voluntary, the district court's selective exclusion of the expert's suggestibility testimony amounted to harmless error. *State v. Stone*, — Idaho —, 303 P.3d 636 (2013).

Impeachment Evidence.

Defendant was entitled to a new trial based on the erroneous exclusion of testimony by an expert in law enforcement interview techniques, and because the expert's evidence was relevant to challenge the reliability of the victims' testimony about instances of sexual abuse; the error was not harmless. *State v. Critchfield*, 153 Idaho 680, 290 P.3d 1272 (2012), review denied, — Idaho —, 2013 Ida. LEXIS 9 (Idaho Jan. 8, 2013).

RESEARCH REFERENCES

A.L.R. Admissibility of person's status as illegal alien in civil pretrial and trial proceedings. 79 A.L.R.6th 351.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Cited in: *State v. Jones*, — Idaho —, 299 P.3d 219 (2013); *State v. Russo*, — Idaho —, — P.3d —, 2013 Ida. App. LEXIS 25 (Mar. 4, 2013).

JUDICIAL DECISIONS

ANALYSIS

Evidence Held Admissible.
Probative Value Outweighed Prejudicial Impact.

Evidence Held Admissible.

During defendant's trial for aggravated battery, the court did not err in allowing a

detective to testify that the detective believed the person in a photograph to be defendant; defendant's claim of lack of probative value was without merit and defendant identified no unfair prejudice. *State v. Salazar*, 153 Idaho 24, 278 P.3d 426 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 151 (Idaho June 11, 2012).

The district court did not abuse its discretion in admitting evidence about the criminality of gangs under this rule and Idaho R. Evid. 404. Both the criminal conduct of a specific gang and the criminal conduct of gangs generally were relevant to proving motive, and the probative value of the evidence was not substantially outweighed by unfair prejudice. The testimony challenged was relevant in understanding defendant's purported motive to shoot the victim because of a seemingly harmless offense, wearing a red jersey in the wrong place. *State v. Almaraz*, — Idaho —, 301 P.3d 242 (2013).

Character witnesses' testimony regarding the defendant's trustworthiness with children was pertinent to the charge of lewd conduct with a six-year-old and should have been admitted. So long as the witnesses testified only to general observations rather than specific incidents, the likelihood of confusion or prejudice would be minimal. *State v. Rothwell*, — Idaho —, 294 P.3d 1137 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 72 (Idaho Feb. 28, 2013).

Probative Value Outweighed Prejudicial Impact.

During defendant's trial for sexual abuse of

a child and rape, the court properly allowed the testimony of alleged prior (20 to 40 years prior), uncharged sexual conduct of defendant to be presented; considering that defendant made statements identifying the targets of his criminal behavior and his reasons for targeting those individuals, the trial court did not err in concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *State v. Pepcorn*, 152 Idaho 678, 273 P.3d 1271 (2012).

Evidence that a witness and defendant associated with each other, although members of different gangs, bore directly on the witness's credibility and was, therefore, relevant as impeachment evidence for the purpose of showing bias. Evidence that they were closely associated, and that their respective gang memberships were a component of that affiliation, was relevant. Also relevant was evidence that it was a tenet of the gangs that they cover for each other, including lying on behalf of other gang members. *State v. Thumm*, 153 Idaho 533, 285 P.3d 348 (2012).

Cited in: *State v. McClain*, — Idaho —, 302 P.3d 367 (2012).

RESEARCH REFERENCES

A.L.R. Admissibility of person's status as illegal alien in civil pretrial and trial proceedings. 79 A.L.R.6th 351.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

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ANALYSIS

Evidence Held Admissible.
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Other Crimes, Wrongs, or Acts.
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Uncharged Conduct.

Evidence Held Admissible.

During defendant's trial for sexual abuse of a child and rape, the court properly allowed the testimony of alleged prior (20 to 40 years prior), uncharged sexual conduct of defendant to be presented; the evidence showed that defendant made a conscious choice to deliberately molest or abuse his wife's siblings and their children. *State v. Pepcorn*, 152 Idaho 678, 273 P.3d 1271 (2012).

The district court did not abuse its discre-

tion in admitting evidence about the criminality of gangs under this rule and Idaho R. Evid. 403. Both the criminal conduct of a specific gang and the criminal conduct of gangs generally were relevant to proving motive, and the probative value of the evidence was not substantially outweighed by unfair prejudice. The testimony challenged was relevant in understanding defendant's purported motive to shoot the victim because of a seemingly harmless offense, wearing a red jersey in the wrong place. *State v. Almaraz*, — Idaho —, 301 P.3d 242 (2013).

Traits relating to a defendant's sexual morality with children are pertinent in cases involving sexual misconduct minor. *State v. Rothwell*, — Idaho —, 294 P.3d 1137 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 72 (Idaho Feb. 28, 2013).

Notice.

The notice requirement of subsection (b) is mandatory, and the failure to comply creates a bar to admissibility. *State v. Whitaker*, 152 Idaho 945, 277 P.3d 392 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 140 (May 31, 2012).

Other Crimes, Wrongs, or Acts.

Trial court did not abuse its discretion in admitting statements that defendant made during a police interview, because they did not likely fall within the purview of Idaho R. Evid. 404(b) as evidence of “character” or “other crimes, wrongs or acts,” when they were little more than acknowledgements of normal human foibles. The statements were not a type of evidence that would present a risk of unfairly prejudicing the jury, because they were brief and vague and included no admission of any particular misconduct. *State v. McClain*, — Idaho —, 302 P.3d 367 (2012).

When defendant’s uncle testified that defendant was a moral person and that the uncle would trust defendant, it was not an abuse of discretion to allow the admission of defendant’s convictions for stalking and violation of a no contact order because, (1) while morality and trustworthiness could encompass honesty, common sense dictated morality and trustworthiness were not confined to that single quality, and (2) the prior convictions were relevant, as such evidence certainly would make a reasonable person doubt the uncle’s unequivocal opinion. *State v. Ormesher*, — Idaho —, 296 P.3d 427 (2012).

Pornographic Images.

In a rape case, the trial court correctly determined that evidence of other acts was relevant to prove defendant’s motive, intent, or plan, where defendant was charged with raping a woman at knifepoint, had admitted to having fantasies involving rape, and had in

his possession pornographic materials depicting simulated rape. *State v. Russo*, — Idaho —, — P.3d —, 2013 Ida. App. LEXIS 25 (Mar. 4, 2013).

Prior Acts.

Defendant’s viewing pornography on an occasion entirely separate from the charged offenses was not part of the charged criminal episode, nor was it necessary in order to provide a complete account of the charged crimes. As that evidence implicated defendant’s character, but was not intrinsic to the crimes charged, it was subject to the strictures of subsection (b). *State v. Whitaker*, 152 Idaho 945, 277 P.3d 392 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 140 (May 31, 2012).

The district court erred in admitting evidence of two prior incidents under subsection (b), where the two incidents that the state presented at trial did not tend to show that the defendant had a prior plan, design, or system which included the doing of the act charged as part of its consummation nor show steps allegedly effectuating a plan to accomplish the charged offense, sexual abuse of a child under the age of 16. *State v. Coleman*, 152 Idaho 872, 276 P.3d 744 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 131 (May 22, 2012).

Uncharged Conduct.

Where defendant was charged with lewd conduct based on manual-genital contact, there was a fatal variance because the jury was instructed that defendant could be found guilty for “any other lewd or lascivious act,” after hearing testimony that defendant touched the victim’s breast area. There was no indication that the testimony was admitted under Idaho R. Evid. 404. *State v. Day*, 152 Idaho 945, 277 P.3d 392 (Ct. App. 2013).

Cited in: *State v. Jones*, — Idaho —, 299 P.3d 219 (2013).

Rule 405. Methods of proving character.**JUDICIAL DECISIONS****Proof of Good Character.**

Because Idaho R. Evid. 405(a) permits inquiry into relevant specific instances of conduct on cross-examination, the prospect of such cross-examination did not justify exclusion of evidence that was offered to show that

defendant did not have the character of a child molester. *State v. Rothwell*, — Idaho —, 294 P.3d 1137 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 72 (Idaho Feb. 28, 2013).

Cited in: *State v. Ormesher*, — Idaho —, 296 P.3d 427 (2012).

ARTICLE VI. WITNESSES.

Rule 606. Competency of juror as witness.

Cited in: State v. Moses, — Idaho —, — P.3d —, 2013 Ida. App. LEXIS 37 (May 3, 2013).

Rule 608. Evidence of character and conduct of witness.

JUDICIAL DECISIONS

Evidence Held Improper.

Trial court did not err by excluding testimony of three witnesses that the infant victim's mother had been unfaithful to defendant, because it was not admissible. It was extrinsic evidence of specific instances of the

mother's conduct, in violation of subsection (b) of this rule, and because the evidence was not relevant under Rule 404 of the Rules of Evidence. State v. Carson, 151 Idaho 713, 264 P.3d 54 (2011).

Rule 609. Impeachment by evidence of conviction of crime.

JUDICIAL DECISIONS

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Determination of Relevance.

Test.

Withheld Judgment.

Determination of Relevance.

Where defendant was charged with numerous sex offenses against a girl from the time she was 10 until she was 17, the trial court did not abuse its discretion in precluding defendant from impeaching the victim's younger brother with a theft conviction that occurred one month before defendant's retrial: given the limited testimony of the witness and given that he was not the alleged victim or a party to the action, his credibility was not central to defendant's case and the probative value of his theft conviction was very low. State v. Grist, 152 Idaho 786, 275 P.3d 12 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 121 (Idaho May 9, 2012).

Test.

In examining the varied relationships between felony convictions and witness credibility, the Idaho courts have divided felonies into three categories having varying degrees of probative value on the issue of credibility. Crimes in the first category, such as perjury, are intimately connected to a person's veracity and credibility, while crimes in the second category, like robbery and burglary, are somewhat less relevant to credibility because they

do not deal directly with veracity and have only a general relationship with honesty. Offenses in the third category, which include crimes of passion and acts of violence that are the product of emotional impulse, have been said to have little or no direct bearing on honesty and veracity. State v. Grist, 152 Idaho 786, 275 P.3d 12 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 121 (Idaho May 9, 2012).

To determine the impact on witness credibility the court must apply a two-prong test to determine whether evidence of a prior felony conviction should be admitted: (1) the court must determine whether the fact or nature of the conviction is relevant to the credibility of the witness; and (2) if so, the court must determine whether the probative value of the evidence outweighs its prejudicial effect. State v. Grist, 152 Idaho 786, 275 P.3d 12 (Ct. App. 2012), review denied, — Idaho —, 2012 Ida. LEXIS 121 (Idaho May 9, 2012).

Withheld Judgment.

The plain language of this rule prohibits the use of a withheld judgment to impeach a witness. Section 19-2601(3) sets forth the meaning of a withheld judgment - the withholding of judgment and the placing of the defendant on probation "on such terms and for such time" as the court may prescribe. State v. Hochrein, — Idaho —, 303 P.3d 1249, 2013 Ida. App. LEXIS 35 (2013), review denied, State v. Edward R, — Idaho —, 2013 Ida. LEXIS 235 (Idaho July 30, 2013).

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY.

Rule 701. Opinion testimony by lay witness.

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Evidence Held Admissible.

Testimony by a toddler's family members that the toddler's behaviors changed for the worse immediately following a car accident was admissible because the ability to observe a young family member's progress from infant to child was not outside of the usual and ordinary experience of the average person. *Carrillo v. Boise Tire Co.*, 152 Idaho 741, 274 P.3d 1256 (2012).

During defendant's trial for aggravated

battery, the court did not err in allowing a detective to testify that the detective believed the person in a photograph to be defendant; although the foundational testimony was limited, it referred to a 20-minute period in which the detective observed defendant at a time when his appearance differed from his appearance at trial. *State v. Salazar*, 153 Idaho 24, 278 P.3d 426 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 151 (Idaho June 11, 2012).

Rule 702. Testimony by experts.

JUDICIAL DECISIONS

ANALYSIS

Admissibility of Testimony.

Applicability.

Credibility of Another Witness.

Admissibility of Testimony.

A detective's testimony on domestic violence was properly allowed. The only objection was whether the detective could offer expert testimony and there were no objections to the opinions that he ultimately gave; that he ultimately gave some testimony that would be objectionable did not establish that the district court abused its discretion in permitting him to testify in the first place. *State v. Parton*, — Idaho —, 300 P.3d 1046 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 179 (Idaho Apr. 1, 2013).

Applicability.

Under this rule, there are a number of

different reasons an attorney may object to evidence: however, an objection that expert testimony invades the province of the jury, without more, is not sufficiently specific to preserve an objection to any of them. *Hansen v. Roberts*, — Idaho —, 299 P.3d 781 (2013).

Credibility of Another Witness.

An expert cannot opine to the accuracy of an eyewitness identification or the credibility of any witness, as those matters are reserved for the jury. However, an expert witness may testify to specific instances of police suggestiveness that may call into question the reliability of the eyewitness testimony. *State v. Almaraz*, — Idaho —, 301 P.3d 242 (2013).

Cited in: *State v. Critchfield*, 153 Idaho 680, 290 P.3d 1272 (2012).

Rule 704. Opinion on ultimate issue.

JUDICIAL DECISIONS

Credibility of Witness.

An expert cannot opine to the accuracy of the eyewitness identification or the credibility of any witness, as those matters are reserved for the jury. However, an expert witness may

testify to specific instances of police suggestiveness that may call into question the reliability of the eyewitness testimony. *State v. Almaraz*, — Idaho —, 301 P.3d 242 (2013).

ARTICLE VIII. HEARSAY.

Rule 801. Definitions.

JUDICIAL DECISIONS

Purpose of Testimony.

Will contestant's testimony of the testator's statements, which focused entirely on the testator's negative feelings toward her children, were properly excluded because the statements were inadmissible hearsay and irrelevant. They did not necessarily speak to

her mental condition or particular susceptibility to influence, but rather were aimed at proving their truth: that she was angry with her children, that they were not worthy to inherit, and that she did not mean for them to inherit. *Wooden v. Martin* (In re Conway), 152 Idaho 933, 277 P.3d 380 (2012).

Rule 802. Hearsay rule.

JUDICIAL DECISIONS

Evidence Held Inadmissible.

Will contestant's testimony of the testator's statements, which focused entirely on the testator's negative feelings toward her children, were properly excluded because the statements were inadmissible hearsay and irrelevant. They did not necessarily speak to

her mental condition or particular susceptibility to influence, but rather were aimed at proving their truth: that she was angry with her children, that they were not worthy to inherit, and that she did not mean for them to inherit. *Wooden v. Martin* (In re Conway), 152 Idaho 933, 277 P.3d 380 (2012).

Rule 803. Hearsay exceptions; availability of declarant immaterial.

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ANALYSIS

Excited Utterance.
Medical Diagnosis.

Excited Utterance.

Testimony by defendant's girlfriend was admissible as an excited utterance; she was not asleep when police officers found her, she had knocked on the door of the police station shortly before being discovered, indicating that she had not been asleep or had time to reflect after the stress of being beaten and

strangled. *State v. Parton*, — Idaho —, 300 P.3d 1046 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 179 (Idaho Apr. 1, 2013).

Medical Diagnosis.

Testimony from a nurse about a statement of a child sexual abuse victim was exempt from the hearsay rule under Idaho R. Evid. 803(4) and therefore was not admitted for a limited purpose. *State v. Rothwell*, — Idaho —, 294 P.3d 1137 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 72 (Idaho Feb. 28, 2013).

Rule 804. Hearsay exceptions; declarant unavailable.

Cited in: *Wooden v. Martin* (In re Conway), 152 Idaho 933, 277 P.3d 380 (2012).

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION.

Rule 901. Requirement of authentication or identification.

JUDICIAL DECISIONS

Public Records and Reports.

Photocopies of documents from defendant's "penitentiary packet" were admissible to prove his persistent violator status. The documents in the packet were certified by each court where defendant had been convicted, and the packet itself was a record required to be kept by the state department of correc-

tions. Photocopies of the contents of that packet were certified by the custodian of the packet. Altogether the elements excused the state from producing the original copy of defendant's judgments of conviction. *State v. Marsh*, 153 Idaho 360, 283 P.3d 107 (2011), review denied, — Idaho —, 2012 Ida. LEXIS 51 (Idaho Feb. 21, 2012).

Rule 902. Self-authentication.

JUDICIAL DECISIONS

Public Records.

—Witness's Affidavit.

Enhancement of sentence based in part on a "penitentiary packet" containing authenticated photocopies of certified copies of prior felony conviction judgments was not an abuse of discretion. The state department of correc-

tions was legally required to keep certified copies of defendant's judgments, and was a proper authority to certify to the authenticity of the photocopies. *State v. Marsh*, 153 Idaho 360, 283 P.3d 107 (2011), review denied, — Idaho —, 2012 Ida. LEXIS 51 (Idaho Feb. 21, 2012).

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS.

Rule 1005. Public records.

JUDICIAL DECISIONS

Photocopies of Certified Copies of Judgments of Conviction.

Enhancement of sentence based in part upon a penitentiary packet containing authenticated photocopies of certified copies of prior felony conviction judgments was proper because the state department of corrections

was legally required to keep certified copies of defendant's judgments and was therefore authorized to certify to the authenticity of the photocopies under Idaho R. Evid. 902(4). *State v. Marsh*, 153 Idaho 360, 283 P.3d 107 (2011), review denied, — Idaho —, 2012 Ida. LEXIS 51 (Idaho Feb. 21, 2012).

IDAHO CRIMINAL RULES

Rule

- 2.1. Declarations.
- 2.3. Electronic signatures.
- 3. Complaint — Initiation and prosecution.
- 4. Warrant — Summons — Determination of probable cause.
- 5. Initial appearance before magistrate — Advice to defendant — Plea in misdemeanors — Initial appearance on grand jury indictment.

Rule

- 5.1. Preliminary hearing — Probable cause hearing — Discharge or commitment of defendant — Procedure.
- 10. Arraignment on indictment or information.
- 16. Discovery and inspection.
- 41. Search and seizure.
- 54.5. Stay on appeal — Powers of magistrate during appeal.

Rule 2. Purpose and construction — Title — District court rules.

JUDICIAL DECISIONS

Psychological Evaluation.

Trial court erred under subsection (d) in denying defendant's motion for a presentence psychological evaluation during the sentencing phase of trial, because the record demonstrated that defendant's mental condition was

a significant factor in determining the sentence; the trial court had explicitly stated its beliefs that "certain mental factors" existed and that defendant needed psychological treatment. *State v. Hanson*, 152 Idaho 314, 271 P.3d 712 (2012).

Rule 2.1. Declarations.

Whenever these rules require or permit a written statement to be made under oath or affirmation, such statement may be made as provided in Idaho Code Section 9-1406. An affidavit includes a written certification or declaration made as provided in Idaho Code section 9-1406. (Adopted April 24, 2013, effective July 1, 2013; amended June 20, 2013, effective July 1, 2013.)

Rule 2.3. Electronic signatures.

An electronic signature may be used on any document that is required or permitted under these rules and that is transmitted electronically, including a search or arrest warrant, a written certification or declaration under penalty of perjury, or an affidavit, and a notary's seal may be in electronic form. (Adopted June 20, 2013, effective July 1, 2013.)

Rule 3. Complaint — Initiation and prosecution.

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate; provided, a prosecuting attorney may, without oath or affirmation, sign a complaint before a magistrate based upon the sworn affidavit, which includes a written certification or declaration under penalty of perjury of a complainant, which shall be filed with the court. Except as otherwise provided by law or rule, all criminal proceedings shall be initiated by complaint or indictment and prosecuted thereafter by complaint, indictment

or information as hereinafter provided by these rules. (Adopted December 27, 1979, effective July 1, 1980; amended March 9, 1999, effective July 1, 1999; amended June 20, 2013, effective July 1, 2013.)

Rule 4. Warrant — Summons — Determination of probable cause.

(a) **Issuance of warrant.** After a complaint is laid before a magistrate, (which may be in the form of the Idaho Uniform Citation for a misdemeanor), the magistrate may issue a warrant for the arrest of the defendant only after making a determination that there is probable cause to believe that an offense has been committed and that the defendant committed it.

(b) **Issuance of summons.** After a complaint is filed with a court, (which may be in the form of the Idaho Uniform Citation for a misdemeanor), the magistrate, or the clerk of the court, may issue a summons requiring the defendant to appear before the court at a time certain without first making a determination of whether there is such probable cause.

(c) **Issuing warrant or summons, preference for summons.** If the magistrate finds such probable cause for a complaint, in determining whether a warrant or summons should issue, the magistrate shall give preference to the issuance of a summons. In making such determination as to whether a warrant or summons shall issue, the magistrate shall consider the following factors:

- (1) The residence of the defendant.
- (2) The employment of the defendant.
- (3) The family relationships of the defendant in the community.
- (4) The past history of response of the defendant to legal process.
- (5) The past criminal record of the defendant.
- (6) The nature of the offense charged.
- (7) Whether there is reasonable cause to believe that the defendant will flee prosecution or will fail to respond to a summons.

(d) **Determination of probable cause after arrest without warrant, or upon appearance or failure to appear by a defendant pursuant to a summons.** If a defendant is arrested without a warrant or appears before the court pursuant to a summons, the magistrate before whom the defendant first appears shall not order the defendant retained or ordered into custody nor require the defendant to post bond unless the magistrate shall determine there is such probable cause as defined in subsection (a) of this Rule at or before the time of the first appearance of the defendant. The defendant must be released upon the defendant's own recognizance unless and until such determination of probable cause has been made by a magistrate or unless immediate disposition of the complaint has been made; but the complaint shall not be dismissed pending such determination or disposition. If a defendant fails to appear in response to a summons a warrant shall issue if probable cause has been shown.

(e) **Hearing to determine probable cause.** The probable cause hearing is an informal nonadversary proceeding. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or

in part, provided there is a substantial basis for believing that there is a factual basis for the information furnished. It shall not be necessary for the defendant to be present at such hearing or to have the right to confrontation and cross-examination of witnesses, nor shall it be necessary to permit the defendant to have or to provide the defendant with counsel. Before making the determination of whether there is such probable cause, the magistrate may require any person, other than the defendant, who appears likely to have knowledge relevant to the offense charged to appear personally and give testimony under oath. The facts which the magistrate considers in determining probable cause shall be placed either in affidavit form, which includes a written certification or declaration under penalty of perjury, or shall be testimony under oath placed upon the record. In making the determination of probable cause, the magistrate shall consider all facts as to whether an offense has been committed and whether the defendant has committed it.

(f) **Disposition on finding of no probable cause.** If the magistrate finds there is no such probable cause, the magistrate shall refuse to issue a warrant, and shall exonerate any bond posted, and shall order the release of the defendant if the defendant is in custody. A finding of a lack of probable cause shall not require the dismissal of the complaint.

(g) **Form.**

(1) **Warrant.** The warrant shall be signed by the magistrate and shall set forth the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall identify the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate. The amount of bail may be fixed by the issuing magistrate and endorsed on the warrant at the time of its issuance.

(2) **Telegraphic or facsimile copy of a warrant of arrest.** After the issuance of a warrant in the form set forth in sub-paragraph (g)(1) above, a copy of that warrant of arrest may be sent by telecommunication process or by facsimile process to any peace officer or other officer serving the warrant. A telegraphic copy should be in the following form:

WARRANT OF ARREST

TELEGRAPHIC COPY

IN THE DISTRICT COURT OF THE JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF

TO ANY SHERIFF, CONSTABLE, MARSHAL, OR PEACE OFFICER OF
THE STATE OF IDAHO:

A COMPLAINT, UPON OATH, HAVING BEEN LAID THIS DAY BE-
FORE ME BY, STATING THAT THE CRIME OF

HAS BEEN COMMITTED IN THE COUNTY OF AND AC-
CUSING

.....
THEREOF, THE ABOVE-NAMED DEFENDANT, AND PROBABLE
CAUSE HAVING BEEN FOUND,

YOU ARE, THEREFORE, COMMANDED TO FORTHWITH ARREST
THE SAID DEFENDANT NAMED ABOVE AND BRING THE DEFEN-
DANT BEFORE ME AT MY OFFICE IN SAID COUNTY OF,
OR IN CASE OF MY ABSENCE OR INABILITY TO ACT, OR ARREST
OUTSIDE OF THIS COUNTY, BEFORE THE NEAREST AVAILABLE
MAGISTRATE WITHIN THE JUDICIAL DISTRICT WHERE THE DE-
FENDANT IS ARRESTED.

DATED AT MY OFFICE IN SAID COUNTY OF
THIS DAY OF, 20.....

.....
MAGISTRATE

BOND FELONY MISDEMEANOR
DAY ONLY DAY OR NIGHT

THIS TELEGRAPHIC COPY IS AN ABSTRACT OF AN OFFICIAL
SIGNED WARRANT ON FILE IN COUNTY.

(3) **Summons.** The summons shall be signed by either the magistrate
or the clerk of the court and shall contain the same information as the
warrant except that it shall summon the defendant to appear before a
magistrate at a stated time and place and advise the defendant that if the
defendant fails to appear at said time and place that a warrant will issue
for the defendant's arrest.

(h) **Execution or service, and return.**

(1) **By whom.** The warrant shall be executed by a peace officer or other
officer authorized by law. The summons may be served by any person
authorized to serve a summons in a civil action, or by mail.

(2) **Territorial limits.** The warrant may be executed or the summons
may be served at any place within the jurisdiction of the state of Idaho.

(3) **Manner of service of warrant.** The warrant shall be executed by
the arrest of the defendant. The officer need not have the warrant in
possession at the time of the arrest, but the officer shall show the warrant
to the defendant as soon as possible. A telegraphic or other copy of the
warrant of arrest may be used by the officer at the time of the arrest or for
the purpose of showing the warrant to the defendant after the defendant's
arrest. If the officer does not have the warrant in possession at the time of
arrest, the officer shall then inform the defendant of the offense charged
and of the fact that a warrant has been issued.

(4) **Manner of service of summons.** The summons shall be served
upon a defendant by delivering a copy of the summons and complaint to
the defendant personally, or by leaving copies thereof at the defendant's

dwelling house or usual place of abode with some person over the age of eighteen (18) years then residing therein, or by mailing it to the defendant by mail to the defendant's last known address. A summons to a corporation shall be served in the same manner as service of a summons on a corporation in a civil action.

(5) **Return on warrant.** The officer executing a warrant shall make return thereof to the issuing magistrate or any other magistrate before whom the defendant is brought pursuant to Rule 5. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the magistrate by whom it was issued and shall be canceled by the magistrate.

(6) **Return on summons.** On or before the return date, the person who made service of a summons shall make return thereof to the magistrate before whom the summons is returnable. At the request of the prosecuting attorney, made at any time while the complaint is pending, a warrant returned unexecuted and not canceled, or an unserved summons or a duplicate original thereof, may be delivered by the magistrate to an officer or other authorized person for execution or service. (Adopted December 27, 1979, effective July 1, 1980; amended April 3, 1981, effective July 1, 1981; amended June 15, 1987, effective November 1, 1987; amended March 27, 1989, effective July 1, 1989; amended June 20, 2013, effective July 1, 2013.)

Rule 5. Initial appearance before magistrate — Advice to defendant — Plea in misdemeanors — Initial appearance on grand jury indictment.

(a) **Initial appearance.** The "initial appearance" before a magistrate shall be the first appearance of the defendant before any magistrate. In the event a defendant appears before more than one magistrate, the first appearance before the first magistrate shall constitute the "initial appearance."

(b) **Place of initial appearance.** A defendant arrested, whether or not pursuant to a warrant, shall be taken before a magistrate in that judicial district without unreasonable delay. In no event shall the delay be more than twenty-four (24) hours following the arrest excluding Saturdays, Sundays, and holidays. Provided, the court may delay the initial appearance if the defendant is hospitalized or otherwise in a condition which prevents the defendant being taken before the magistrate. The court may immediately, in such instances, appoint counsel for the defendant. In the event it is not possible to take a defendant before a magistrate within the county where the alleged offense occurred within the said time limit, then the defendant shall be taken to any available magistrate within the judicial district without unnecessary delay within the time limit described above.

(c) **Determination of probable cause.** In the event the defendant was arrested without a warrant, the magistrate before whom the defendant first appears shall not hold the defendant in custody nor require bail without

first making a determination as to whether there is probable cause to believe that an offense has been committed and that the defendant committed it as provided in Rule 4 unless such a finding has been made by a magistrate in a county in which the offense is alleged to have been committed. The probable cause hearing may be an ex parte hearing which does not require the presence of the defendant and shall be held within forty-eight (48) hours, including Saturdays, Sundays, and holidays, after a defendant is arrested without a warrant. The magistrate may hold the hearing on sworn statements, which includes written certifications or declarations under penalty of perjury, without the officer or witness present.

(d) **Advice to defendant on initial appearance outside.** In the event a defendant is taken before a magistrate in a county other than the county in which the alleged offense occurred, the magistrate shall advise the defendant:

- (1) That the defendant is not required to make a statement and that any statement made may be used against the defendant;
- (2) The charge or charges against the defendant;
- (3) Defendant's right to bail;
- (4) Defendant's right to counsel as provided by law;
- (5) Defendant's right to proceed under Rule 20 of these rules;
- (6) That defendant has a right to communicate with counsel and immediate family, and that reasonable means will be provided for the defendant to do so.

(e) **Setting bail.** Upon advising the defendant of the above rights, the magistrate shall set bail for the defendant, and in the event the arrest is pursuant to a warrant, said bail shall be in the amount endorsed upon the warrant unless the magistrate finds good cause to alter the amount of the bail. In the event the defendant posts bail, the magistrate shall certify that fact upon the warrant, order the defendant to appear before the court issuing the warrant at a time and place certain, discharge the defendant, and transmit the warrant and undertaking of bail to the court in which the defendant is required to appear.

(f) **Advice to defendant on initial appearance in county where alleged offense occurred.** In the event a defendant is taken before a magistrate in the county where the alleged offense occurred, the magistrate shall advise the defendant:

- (1) That the defendant is not required to make a statement and that any statement made may be used against the defendant;
- (2) The charge or charges against the defendant;
- (3) Defendant's right to bail;
- (4) Defendant's right to counsel as provided by law;
- (5) Defendant's right to a preliminary hearing, if provided by law, the nature of a preliminary hearing and the effect of a waiver thereof;
- (6) That the defendant has a right to communicate with counsel, or immediate family, and that reasonable means will be provided for the defendant to do so.

(g) **Right to counsel.**

(1) If a defendant is charged with an offense the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correctional facility regardless of whether actually imposed, and the defendant appears without counsel, the court shall advise the defendant of:

(A) the right to counsel;

(B) the right to apply for court appointed counsel if the defendant cannot afford to hire private counsel; and

(C) the right to request counsel at any stage of the proceedings.

(2) If the defendant wishes to represent himself or herself, the court shall ensure that a knowing, voluntary, and intelligent waiver of the right to counsel is entered on the record.

(3) Prior to accepting any waiver pursuant to subsection (2), the trial court shall advise the defendant of the following:

(A) the nature of the charges;

(B) the range of allowable punishments;

(C) that there may be defenses;

(D) that there may be mitigating circumstances; and

(E) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the dangers and disadvantages of the decision to waive counsel.

(4) The court may appoint counsel for the limited purpose of advising and consulting with the defendant as to the waiver.

(h) **Arraignment on misdemeanor complaint.** The arraignment upon a misdemeanor complaint is the reading of the complaint to the defendant, unless waived by the defendant, and taking a plea of the defendant to the complaint. The arraignment upon a complaint for a misdemeanor may take place at the initial appearance, or at such later time as ordered by the court. A plea of the defendant at the arraignment in a county other than the county where the alleged offense occurred may be taken by the magistrate only as provided by Rule 20. The defendant may appear in person at the arraignment and enter a plea to the complaint or the defendant may appear at the arraignment through counsel who shall either appear in person or shall file, at or before arraignment, a written appearance and plea on behalf of the defendant.

(i) **First appearance on indictment by grand jury.** A defendant arrested on a warrant issued pursuant to an indictment by grand jury shall be taken before a magistrate judge or district court judge in that judicial district without unreasonable delay. In no event shall the delay be more than twenty-four (24) hours following the arrest excluding Saturdays, Sundays and holidays. The magistrate judge or district court judge shall have the authority to set bail and shall advise the defendant:

(1) That the defendant is not required to make a statement and that any statement made by defendant may be used against the defendant;

(2) The charge or charges against the defendant;

- (3) The defendant's right to bail;
 - (4) The defendant's right to counsel as provided by law;
 - (5) The date that defendant will be arraigned in the district court.
- (Adopted December 27, 1979, effective July 1, 1980; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987; amended effective August 21, 1991; amended February 10, 1993, effective July 1, 1993; amended effective July 1, 2004; amended March 28, 2007, effective July 1, 2007; amended March 19, 2009, effective July 1, 2009; amended June 20, 2013, effective July 1, 2013; amended June 25, 2013, effective July 1, 2013.)

Rule 5.1. Preliminary hearing — Probable cause hearing — Discharge or commitment of defendant — Procedure.

(a) **Preliminary hearing.** Unless indicted by a grand jury, a defendant, when charged in a complaint with any felony, is entitled to a preliminary hearing. If the defendant waives the preliminary hearing, the magistrate shall forthwith file a written order in the district court holding the defendant to answer. If the defendant does not waive the preliminary hearing, the magistrate shall fix a time for the preliminary hearing to be held within a reasonable time, but in any event not later than fourteen (14) days following the defendant's initial appearance if the defendant is in custody and no later than twenty-one (21) days after the initial appearance if the defendant is not in custody. With the consent of the defendant and upon showing of good cause, taking into account the public interest and prompt disposition of criminal cases, time limits in this subsection may be extended. In the absence of such consent by the defendant, time limits may be extended only upon a showing that extraordinary circumstances exist, including disqualification of the magistrate by the defendant pursuant to Rule 25.

(b) **Probable cause finding.** If from the evidence the magistrate determines that a public offense has been committed and that there is probable or sufficient cause to believe that the defendant committed such offense, the magistrate shall forthwith hold the defendant to answer in the district court. The finding of probable cause shall be based upon substantial evidence upon every material element of the offense charged; provided that hearsay in the form of testimony, or affidavits, including written certifications or declarations under penalty of perjury, may be admitted to show the existence or nonexistence of business or medical facts and records, judgments and convictions of courts, ownership of real or personal property and reports of scientific examinations of evidence by state or federal agencies or officials or by state-certified laboratories, provided the magistrate determines the source of said evidence to be credible. Provided, nothing in this rule shall prevent the admission of evidence under any recognized exception to the hearsay rule of evidence. The defendant shall be entitled to cross-examine witnesses produced against the defendant at the hearing and may introduce evidence in defendant's own behalf. Motions to suppress must be

made in a trial court as provided in Rule 12; provided, if at the preliminary hearing the evidence shows facts which would ultimately require the suppression of evidence sought to be used against the defendant, such evidence shall be excluded and shall not be considered by the magistrate in his determining probable cause. A record of the proceedings shall be made by stenographic means or recording devices.

(c) **Discharge of defendant.** If from the evidence the magistrate does not determine that a public offense has been committed or that there is not probable or sufficient cause to believe that the defendant committed such offense, the magistrate shall dismiss the complaint and discharge the defendant.

(d) **Records.** After concluding the proceeding, the magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. (Adopted December 27, 1979, effective July 1, 1980; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended March 9, 1999, effective July 1, 1999; amended November 20, 2012, effective January 1, 2013; amended June 20, 2013, effective July 1, 2013.)

JUDICIAL DECISIONS

ANALYSIS

Construction.
Probable Cause.

Construction.

At a preliminary hearing, the State is required to present evidence upon every material element of the offense charged, and while Idaho Crim. R. 5.1 does not refer to the "offense as charged," the State presents its theory of the charge, both through argument and by the complaint filed; the magistrate is required to examine the charge from the State, along with the evidence presented, and determine whether public offense has been committed and if there is probable or sufficient cause to believe that the defendant committed such offense; in doing so, the mag-

istrate is entitled to rely on the theory and argument set forth by the State, and there is no requirement that the magistrate search the record and the law to find alternate theories of the case for the State to proceed under. *State v. McLellan*, — Idaho —, 294 P.3d 203 (2013).

Probable Cause.

Prosecution alleged that defendant violated I.C. § 18-6609 based on the theory that a previously recorded video was "obtained" when editing and captions were added with the intent to degrade or abuse the victim; because the State limited itself to this theory, the trial court properly limited its review on probable cause to the prosecution's theory. *State v. McLellan*, — Idaho —, 294 P.3d 203 (2013).

Rule 7. Indictment and information.

JUDICIAL DECISIONS

Indictment or Information.

Informations are of equal dignity with indictments, subject to the limitations that a defendant may only be accused by information after commitment by a magistrate and that an information cannot be issued if the

charge has been previously brought, and ignored by, a grand jury. *Warren v. Craven*, 152 Idaho 327, 271 P.3d 725 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 49 (Idaho Feb. 15, 2012).

Rule 10. Arraignment on indictment or information.

(a) **In general.** After an indictment or an information has been filed with the district court, the defendant must be arraigned thereon by the court. The defendant must appear in person at such arraignment.

(b) **Right to counsel.** If the defendant appears for arraignment without counsel, before arraigned, the defendant must be informed by the court that it is defendant's right to have counsel either of defendant's own selection, or if indigent, by court appointment. The defendant must be asked if defendant desires counsel and if defendant is able to provide such counsel. If the defendant desires counsel and is found to be an indigent person as defined by section 19-854, Idaho Code, the court shall appoint counsel to represent the defendant. No proceedings may take place prior to the appointment of counsel or until the defendant has had a reasonable period of time to obtain counsel, or unless the defendant waives the right to counsel.

(c) **Arraignment.** Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant may waive the reading of the indictment or information. The defendant shall be given a copy of the indictment or information before the defendant is called upon to plead. The defendant must be informed that if the name which appears on the indictment or information is not defendant's true name, the defendant must then declare defendant's true name or be proceeded against by the name in the indictment or information. If on the arraignment the defendant requires time to enter a plea, the defendant must be allowed a reasonable time, not less than one (1) day, within which to answer the indictment or information.

(d) **Method of securing defendant's appearance.**

(1) When the defendant's appearance is necessary, and the defendant is in custody, the court may direct the officer who has custody of the defendant to produce the defendant.

(2) If the defendant is at liberty on defendant's own recognizance or on bail pursuant to a court order issued in the same criminal action, the prosecuting attorney must, upon at least three (3) days' notice to the defendant and to defendant's attorney, notify the defendant and defendant's attorney that an information or indictment has been filed against the defendant and the time and place set before the court for arraignment. Notice shall be given to the defendant either in person or by mail at the defendant's last known address.

(3) If the defendant, who is at liberty on defendant's own recognizance or on bail pursuant to a previous court order issued in that same criminal action, does not appear to be arraigned, the court, in addition to the forfeiture of the undertaking or bail, may issue a bench warrant for defendant's arrest. Upon taking the defendant into custody pursuant to such bench warrant, the executing peace officer must, without unnecessary delay, bring the defendant into such district court for arraignment. (Adopted December 27, 1979, effective July 1, 1980; amended June 25, 2013, effective July 1, 2013.)

JUDICIAL DECISIONS

Reasonable Time.

No violation of this rule occurred where a trial court failed to inform defendant that he was entitled to have at least 24 hours to consider a plea on an amended information,

as the defendant did not indicate that he needed any additional time to plead not guilty. *State v. Herrera*, — Idaho —, 266 P.3d 499 (2011).

Rule 11. Pleas.

JUDICIAL DECISIONS

ANALYSIS

Conditional Plea.**Failure to Inform of Rights.****Withdrawal of Plea.****Conditional Plea.**

A plea of guilty, if voluntarily and knowingly made, is conclusive as to the defendant's guilt and waives all non-jurisdictional defects in prior proceedings against the defendant. However, a defendant may preserve such defects or issues by entering a conditional guilty plea pursuant to paragraph (a)(2). *State v. Manzanares*, 152 Idaho 410, 272 P.3d 382 (2012).

Failure to Inform of Rights.

Due process and this rule require that a defendant be informed, prior to the entry of a guilty plea, of the minimum and maximum

potential sentence, not of the actual sentence that the court will impose within that range. *Steele v. State*, 153 Idaho 783, 291 P.3d 466 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 241 (Idaho Dec. 12, 2012).

Withdrawal of Plea.

Denial of defendant's motion to withdraw his guilty plea was proper because he failed to allege that he would not have pleaded guilty had he been correctly informed about the maximum sentence he faced. He also failed to present evidence or argument that would demonstrate how he was prejudiced when he had received no greater sentence than that of which he was forewarned; therefore, the alleged error was harmless. *State v. Thomas*, — Idaho —, 297 P.3d 268 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 94 (Idaho Mar. 25, 2013).

Rule 12. Pleadings and motions before trial — Form of pleadings — Defenses and objections.

JUDICIAL DECISIONS

Challenges to Information.

Trial court lacked jurisdiction, where the indictment alleged acts that were made criminal by § 18-1506(1)(d), which was enacted in

2008, but the alleged acts occurred in 2001 and 2002. *State v. Olin*, 153 Idaho 891, 292 P.3d 282 (2012), review denied, — Idaho —, 2013 Ida. LEXIS 35 (Idaho Jan. 30, 2013).

Rule 16. Discovery and inspection.

(a) **Automatic disclosure of evidence and material by the prosecution.** As soon as practicable following the filing of charges against the accused, the prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession or control, or which thereafter comes into the prosecuting attorney's possession or control, which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment therefor. The prosecuting attorney's obligations under this paragraph extend to material and information in the possession or control of members of prosecuting attorney's staff and of any others who have participated in the investigation

or evaluation of the case who either regularly report, or with reference to the particular case have reported, to the office of the prosecuting attorney.

In addition, the office of the prosecuting attorney shall disclose the general nature of evidence of other crimes, wrongs, or acts, it intends to introduce at trial in accordance with the provisions of Rule 404(b) of the Idaho Rules of Evidence.

(b) Disclosure of evidence and materials by the prosecution upon written request. Except as otherwise hereinafter provided in this rule, the prosecuting attorney shall at any time following the filing of charges, upon written request by the defendant, disclose the following information, evidence and material to the defendant, which shall not be filed with the court, unless otherwise ordered.

(1) Statement of defendant. Upon written request of a defendant the prosecuting attorney shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence; and also the substance of any relevant, oral statement made by the defendant whether before or after arrest to a peace officer, prosecuting attorney or the prosecuting attorney's agent; and the recorded testimony of the defendant before a grand jury which relates to the offense charged.

(2) Statement of a co-defendant. Upon written request of a defendant the prosecuting attorney shall permit the defendant to inspect and copy or photograph any written or recorded statements of a co-defendant; and the substance of any relevant oral statement made by a co-defendant whether before or after arrest in response to interrogation by any person known by the co-defendant to be a peace officer or agent of the prosecuting attorney.

(3) Defendant's prior record. Upon written request of the defendant, the prosecuting attorney shall furnish the defendant such copy of the defendant's prior criminal record, if any, as is then or may become available to the prosecuting attorney.

(4) Documents and tangible objects. Upon written request of the defendant, the prosecuting attorney shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, which are in the possession, custody or control of the prosecuting attorney and which are material to the preparation of the defense, or intended for use by the prosecutor as evidence at trial, or obtained from or belonging to the defendant.

(5) Reports of examinations and tests. Upon written request of the defendant the prosecuting attorney shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody

or control of the prosecuting attorney, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence.

(6) **State witnesses.** Upon written request of the defendant the prosecuting attorney shall furnish to the defendant a written list of the names and addresses of all persons having knowledge of relevant facts who may be called by the state as witnesses at the trial, together with any record of prior felony convictions of any such person which is within the knowledge of the prosecuting attorney. The prosecuting attorney shall also furnish upon written request the statements made by the prosecution witnesses or prospective prosecution witnesses to the prosecuting attorney or the prosecuting attorney's agents or to any official involved in the investigatory process of the case unless a protective order is issued as provided in Rule 16(k).

(7) **Expert witnesses.** Upon written request of the defendant the prosecutor shall provide a written summary or report of any testimony that the state intends to introduce pursuant to Rules 702, 703 or 705 of the Idaho Rules of Evidence at trial or hearing. The summary provided must describe the witness's opinions, the facts and data for those opinions, and the witness's qualifications. Disclosure of expert opinions regarding mental health shall also comply with the requirements of I.C. § 18-207. The prosecution is not required to produce any materials not subject to disclosure under paragraph (f) of this Rule. This subsection does not require disclosure of expert witnesses, their opinions, the facts and data for those opinions, or the witness's qualifications, intended only to rebut evidence or theories that have not been disclosed under this Rule prior to trial.

(8) **Police reports.** Upon written request of the defendant the prosecuting attorney shall furnish to the defendant reports and memoranda in possession of the prosecuting attorney which were made by a police officer or investigator in connection with the investigation or prosecution of the case.

(9) **Disclosure by order of the court.** Upon motion of the defendant showing substantial need in the preparation of the defendant's case for additional material or information not otherwise covered by this Rule 16(b), and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order the additional material or information to be made available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

(c) **Disclosure of evidence by the defendant upon written request.** Except as otherwise hereinafter provided in this rule, the defendant shall at any time following the filing of charges against the defendant, upon written request by the prosecuting attorney, disclose the following information, evidence and material to the prosecuting attorney, which shall not be filed with the court, unless otherwise noted.

(1) **Documents and tangible objects.** Upon written request of the prosecuting attorney, the defendant shall permit the prosecutor to inspect and copy or photograph books, papers, documents, photographs, tangible objects or copies or portions thereof, which are within the possession, custody or control of the defendant, and which the defendant intends to introduce in evidence at the trial.

(2) **Reports of examinations and tests.** Upon written request of the prosecuting attorney, the defendant shall permit the state to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to testimony of the witness.

(3) **Defense witness.** Upon written request of the prosecuting attorney, the defendant shall furnish the state a list of names and addresses of witnesses the defendant intends to call at trial.

(4) **Expert witnesses.** Upon written request of the prosecutor the defendant shall provide a written summary or report of any testimony that the defense intends to introduce pursuant to Rules 702, 703 or 705 of the Idaho Rules of Evidence at trial or hearing. The summary provided must describe the witness's opinions, the facts and data for those opinions and the witness's qualifications. Disclosure of expert opinions regarding mental health shall also comply with the requirements of I.C. § 18-207. The defense is not required to produce any materials not subject to disclosure under paragraph (h) of this Rule, or any material otherwise protected from disclosure by his constitutional rights.

(d) **Redacting protected information from responses to discovery.** The party providing discovery may redact protected information from the information or material provided.

(1) Protected information means:

A. Contact information. The home addresses, business addresses, telephone numbers (including cell phones), and email addresses of an alleged victim, or of a witness, or of the spouse, children, or other close family members of the alleged victim or witness, and the places where any of such persons regularly go, such as schools and places of employment and worship.

B. Personal identifying information. The dates of birth and social security numbers of any persons other than the defendant.

C. Private information. Personal identification numbers (PINs), passwords, financial account numbers, information relating to financial transaction cards, and medical information protected by federal law that is not directly related to the crime charged.

(2) A prosecuting attorney who redacts protected information shall follow the following procedure:

A. If the defendant is represented by counsel, the prosecuting attorney shall serve defendant's counsel with a redacted copy of the discovery printed on white paper simultaneously with an unredacted copy of the discovery printed on paper of a color that is clearly distinguishable from white. The defendant's attorney, including appellate counsel, shall not disclose the protected information to the defendant or to a member of the defendant's family without the consent of the prosecuting attorney or an order of the court upon a showing of need.

B. If the defendant is not represented by counsel, the prosecuting attorney shall serve the defendant with a redacted copy of the discovery and, within seven (7) days of doing so, even if the disclosure was not in response to a discovery request, shall file with the court and serve upon the defendant a motion for a protective order with respect to the redacted information.

(3) A defense attorney or defendant who redacts protected information shall serve the prosecuting attorney with a redacted copy of the discovery printed on white paper simultaneously with an unredacted copy of the discovery printed on paper of a color that is clearly distinguishable from white. The state's attorney, including appellate counsel, shall not disclose the protected information to the alleged victim or to a member of the alleged victim's family without the consent of the defendant or an order of the court upon a showing of need.

(e) **Failure to make written request, waiver.**

(1) Any request by a party for information, evidence or material under subsections (b) and (c) of this rule must be in writing with the original document filed with the court and a copy served upon the prosecuting attorney or the defense attorney. Failure to so file and serve such request in writing, shall constitute a waiver of the right to discovery under subsections (b) and (c) of this rule. If no written request for discovery is so filed and served by the defendant, the defendant shall not be permitted to raise as error in any subsequent proceeding the failure of the prosecution to disclose the information described in subsection (b) of this rule.

(2) **Form of request.** A request for the information, evidence and material under subsection (b) of this rule shall be in substantially the following form:

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ____

STATE OF IDAHO,)	
Plaintiff,)	Case No. _____
v.)	REQUEST FOR
_____,)	DISCOVERY
Defendant.)	

TO: THE (PROSECUTING ATTORNEY OF _____ COUNTY)
(DEFENDANT):

PLEASE TAKE NOTICE that the undersigned pursuant to Rule 16 of the Idaho Criminal Rules request discovery and inspection of the following information, evidence and materials:

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____
- 7. _____
- 8. _____
- 9. _____
- 10. _____

The undersigned further requests permission to inspect and copy said information, evidence and materials on the _____ day of ____, 20____, at _____.

Dated this _____ day of _____, 20____.

Attorney for (Plaintiff) (Defendant)

(CERTIFICATE OF SERVICE)

(f) Response to request, failure to file a response.

(1) **Response to request.** The party upon whom a request has been served shall file and serve a written response within fourteen (14) days of service of the request by filing the original copy with the court and serving a copy upon the opposing party which shall state one or more of the following:

A. That the response has already been complied with and that the inquiring party has been furnished the information, evidence and material listed in the request.

B. That there is no objection to the discovery of the information, evidence and materials sought by the request and that the opposing party shall be permitted discovery at a time and place certain.

C. That the responding party objects to part or all of the information, evidence and materials sought to be discovered in the response, which objection shall be specific and shall state the grounds for the objection.

(2) **Failure to comply.** Unless otherwise ordered by the court upon the showing of good cause or excusable neglect, the failure to file and serve a response within the time prescribed by this rule shall constitute a waiver

of any objections to the request and shall be grounds for the imposition of sanctions by the court.

(3) A response to a request shall be in substantially the following form:

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF _____

STATE OF IDAHO,
Plaintiff,
v.
_____,
Defendant.

)
) Case No. _____
) RESPONSE TO
) REQUEST FOR DISCOVERY
)

COMES NOW the (Plaintiff) (Defendant) and submits the following
Response to the Request for Discovery:

(Plaintiff) (Defendant) has complied with such request by _____

(or)
(Plaintiff) (Defendant) will comply with such request by _____

(and/or)
(Plaintiff) (Defendant) objects to (all of the request) (that part of the
request for the discovery of _____.)

The grounds for this objection are as follows: _____

Dated this _____ day of _____, 20____.

Attorney for (Plaintiff) (Defendant)

(CERTIFICATE OF SERVICE)

ACKNOWLEDGMENT OF DISCOVERY

(Optional)

The undersigned hereby acknowledges that discovery has been permitted
of the following information, evidence and materials pursuant to the
Request for Discovery.

Dated this _____ day of _____, 20____.

Attorney for (Plaintiff) (Defendant)

(g) Prosecution information not subject to disclosure.

(1) **Work product.** Disclosure shall not be required of legal research or of records, correspondence, reports of memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of the prosecuting attorney's legal staff.

(2) **Informants.** Disclosure shall not be required of an informant's identity unless such informant is to be produced as a witness at a hearing or trial, subject to any protective order under Rule 16(k) or a disclosure order under Rule 16(b)(8).

(h) **Defense information not subject to disclosure.** Except as to scientific or medical reports, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant or state or defense witnesses, or prospective state or defense witnesses to the defendant, defendant's agents or attorneys.

(i) **Failure to call witnesses.** The fact that a witness's name is on a list furnished under this rule and that witness is not called shall not be commented upon at the trial.

(j) **Continuing duty to disclose.** If, subsequent to compliance with a request issued pursuant to this rule, and prior to or during trial, a party discovers additional evidence or the evidence of an additional witness or witnesses, or decides to use additional evidence, witness or witnesses, such evidence is automatically subject to discovery and inspection under such prior request and such party shall promptly notify the other party or that party's attorney and the court of the existence of such additional evidence or the names of such additional witness or witnesses in order to allow the other party to make an appropriate request for additional discovery or inspection.

(k) **Orders for discovery.** If a party has failed to comply with a request for discovery under this rule, the court upon motion of a party, may, order a party to permit the discovery or inspection, prohibit the discovery of part or all of the information, evidence or material sought to be discovered, or enter such other order as it deems just in the circumstances. An order of the court granting discovery under this rule shall specify the time, place and manner of making the discovery and inspection permitted and prescribe such terms and conditions as are just.

(l) **Protective orders.** Upon a sufficient showing, after notice and hearing, the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate,

including an order denying a request for disclosure of names and addresses of witnesses or others who may be subjected to economic, physical or other harm or coercion. The court may permit a party to make such showing in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief after such showing, the entire text of the party's statement shall be sealed and preserved in the record of the court to be made available to the appellate court in the event of an appeal.

(m) Sexually exploitative material.

(1) Any property or material that constitutes or is alleged to constitute sexually exploitative material as defined in I.C. § 18-1505B or I.C. § 18-1507 shall remain in the care custody, and control of either the court or a law enforcement agency.

(2) A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes or is alleged to constitute sexually exploitative material as defined in I.C. § 18-1505B or I.C. § 18-1507, so long as the state makes the property or material reasonably available to the defendant.

(3) For purposes of subsection (m)(2) of this rule, property or material shall be deemed to be reasonably available to the defendant if the state provides ample opportunity for inspection, viewing, and examination of the property or material by the defendant, defense counsel, and any individual the defendant may seek to qualify to furnish expert testimony at trial. (Adopted December 27, 1979, effective July 1, 1980; am. February 20, 1980, effective July 1, 1980; amended March 27, 1989, effective July 1, 1989; amended March 9, 1999, effective July 1, 1999; amended March 28, 2007, effective July 1, 2007; amended February 9, 2012, effective July 1, 2012; amended November 20, 2012, effective January 1, 2013; amended October 6, 2013, effective January 1, 2014.)

Rule 21. Change of venue.

JUDICIAL DECISIONS

Pretrial Publicity.

Trial court did not err under this rule in denying defendant's motion for a change of venue during a trial for grand theft of approximately 20 calves, because the presumption of prejudice did not apply; pretrial publicity surrounding unrelated charges for attempted murder and solicitation of murder was relatively factual and non-inflammatory. *State v. Hadden*, 152 Idaho 371, 271 P.3d 1227 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 89 (Idaho Mar. 21, 2012).

Trial court did not err in denying defendant's motions for a change of venue, as it was apparent that defendant could receive a fair trial; the jurors exposed to pretrial publicity testified that they could be unbiased and the

nature of the pretrial publicity was relatively factual and non-inflammatory. *State v. Hadden*, 152 Idaho 371, 271 P.3d 1227 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 89 (Idaho Mar. 21, 2012).

Publicity by itself does not require a change of venue, and error cannot be predicated on the mere existence of pretrial publicity concerning a criminal case. However, a defendant's inability to make a detailed and conclusive showing of prejudice is not a proper ground for refusing to change venue, as prejudice seldom can be established or disproved with certainty. Rather, it is sufficient for the accused to show there was a reasonable likelihood that prejudicial news coverage prevented a fair trial in violation of the Sixth

Amendment to the United States Constitution. *State v. Hadden*, 152 Idaho 371, 271 P.3d

1227 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 89 (Idaho Mar. 21, 2012).

Rule 24. Trial jurors.

JUDICIAL DECISIONS

Mid-trial Questioning.

Court violated defendant's due process rights by denying a mid-trial request to question a juror who was suffering from anxiety and might be unable to continue; by denying

inquiry of the juror, the court precluded the only opportunity to establish a factual record upon which to seek removal of the juror for cause. *State v. Moses*, — Idaho —, — P.3d —, 2013 Ida. App. LEXIS 37 (May 3, 2013).

RESEARCH REFERENCES

A.L.R. Propriety of juror's tests or experiments outside of court or jury room. 77 A.L.R.6th 251.

Rule 24.1. Notes by jurors — Juror notebooks.

Collateral References. Propriety of juror's tests or experiments outside of court or jury room. 77 A.L.R.6th 251.

Rule 29.1. Motion for mistrial.

JUDICIAL DECISIONS

Mistrial Denied.

Trial court's denial of a mistrial was not reversible error, because a disclosure of a previous trial and appeal was harmless considering the overwhelming evidence of guilt presented at trial and the curative instruction given by the trial court. *State v. Watkins*, 152 Idaho 764, 274 P.3d 1279 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 123 (May 9, 2012).

Although a State's witness purportedly referenced defendant's alleged gang affiliation, a mistrial was not warranted. The passing reference to "my homie" and the "hood," and a gesture to a neck tattoo were not necessarily indicative of gang affiliation. Moreover, the allegedly prejudicial testimony did not contribute to the verdict in any meaningful way. *State v. Thumm*, 153 Idaho 533, 285 P.3d 348 (2012).

Rule 30. Instructions and communications with jury.

JUDICIAL DECISIONS

Failure to Object.

Ordinarily, a party may not claim a jury instruction was erroneous unless the party objected to the instruction prior to the start of jury deliberations. However, even absent a timely objection to the trial court, a narrow exception exists for those issues rising to the level of fundamental error. The Idaho supreme court has clarified the fundamental error doctrine applicable where an alleged error was not followed by a contemporaneous objection. Such review includes a three-

pronged inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-pronged inquiry, then the appellate court shall

vacate and remand. *State v. Hadden*, 152 Idaho 371, 271 P.3d 1227 (2012), review de-

nied, — Idaho —, 2012 Ida. LEXIS 89 (Idaho Mar. 21, 2012).

Rule 32. Standards and procedures governing presentence investigations and reports.

JUDICIAL DECISIONS

ANALYSIS

Contents of Report.
Investigator's Comments.
Judgment Creditor.
— Hearsay Evidence.
Psychological Evaluation.

Contents of Report.

Defendant failed to show an abuse of discretion in declining to strike portions of the presentence investigation report because defendant was unable to show any of the information to which he objected or which he rebutted was found to be unreliable or inaccurate by the district court. *State v. Carey*, 152 Idaho 720, 274 P.3d 21 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 113 (Idaho Apr. 25, 2012).

Investigator's Comments.

Presentence investigation report did not violate subsection (c) of this rule; there was no evidence that the trial judge saw the investigator's comments as a recommendation of a fixed-life sentence after defendant was convicted of first-degree murder and, while the investigator's comments came close to crossing the line, no specific sentence was, in fact, recommended. *State v. Draper*, 151 Idaho 576, 261 P.3d 853 (2011).

Rule 33. Sentence and judgment.

JUDICIAL DECISIONS

ANALYSIS

Allocation.
Withdrawal.
— Generally.
Withdrawal of Plea.
— Denied.

Allocation.

Although there is case law that accepts allocation as a constitutional right guaranteed by due process when a defendant requests to make a statement and the district court affirmatively denies that request, due process, under Article I, Section 13, of the Idaho Constitution, does not always require that a defendant be afforded the right to

Judgment Creditor.

— Hearsay Evidence.

The pre-sentence investigation report compiled by a probation or parole officer may contain a great deal of hearsay information; however, the court need not allow the defendant to cross-examine all of the sources of such information. *State v. Martinez*, — Idaho —, 303 P.3d 627 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 222 (Idaho June 27, 2013).

Psychological Evaluation.

Section 19-2522, not this rule, governs whether a psychological evaluation must be ordered. *State v. Carter*, — Idaho —, — P.3d —, 2012 Ida. App. LEXIS 12 (Feb. 8, 2012).

No manifest error occurred when the trial court failed to order, sua sponte, a psychological evaluation for use in sentencing a 67-year-old defendant for lewd conduct with a seven-year-old child. Even if defendant's dementia was a significant factor at sentencing, the district court already had a psychosexual evaluation and social/sexual assessment before it. *State v. Clinton*, — Idaho —, — P.3d —, 2012 Ida. App. LEXIS 49 (Aug. 20, 2012).

allocation. *State v. Hansen*, — Idaho —, 303 P.3d 241 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 233 (Idaho July 18, 2013).

Withdrawal.

— Generally.

To prevail on an ineffective assistance of counsel claim, the petitioner must show that his defense attorney's performance was deficient, and ordinarily the petitioner must also show that the defendant was prejudiced by the deficiency. To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Zepeda v. State*, 152 Idaho 710,

274 P.3d 11 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 116 (Idaho Apr. 25, 2012).

While prejudice from ineffective assistance may be presumed when defense counsel fails to file a notice of appeal after the defendant so requests, that presumption does not apply to a defense attorney's failure to file a motion to withdraw a guilty plea. *Zepeda v. State*, 152 Idaho 710, 274 P.3d 11 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 116 (Idaho Apr. 25, 2012).

Withdrawal of Plea.

Denial of defendant's motion to withdraw his guilty plea was proper because he failed to allege that he would not have pleaded guilty had he been correctly informed about the maximum sentence he faced. He also failed to present evidence or argument that would

demonstrate how he was prejudiced when he had received no greater sentence than that of which he was forewarned; therefore, the alleged error was harmless. *State v. Thomas*, — Idaho —, 297 P.3d 268 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 94 (Idaho Mar. 25, 2013).

— Denied.

Where defendant filed an "Amended Motion for Withdrawal of Plea of Guilty and Motion for Post-Conviction Relief" in his criminal case five months after the judgment of conviction was entered, the motion was time-barred by subsection (c) of this rule and could not be treated as a petition for postconviction relief. *State v. Allen*, 153 Idaho 367, 283 P.3d 114 (2012).

Rule 34. New trial.

JUDICIAL DECISIONS

Construction with Other Law.

Pursuant to Idaho Crim. R. 45(b)(3), the two-year limitation period in this rule for a motion for a new trial on the ground of newly

discovered evidence cannot be extended. *State v. Smith*, — Idaho —, 300 P.3d 1069 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 156 (Idaho May 16, 2013).

Rule 35. Correction or reduction of sentence.

Cited in: *State v. Garcia-Pineda*, — Idaho —, 299 P.3d 794, 2013 Ida. App. LEXIS 32 (2013).

JUDICIAL DECISIONS

ANALYSIS

Abuse of Discretion.

Application.

Correction of Sentence.

Denial of Motion Proper.

Evidence.

Jurisdiction.

New or Additional Information.

Review of Record.

Scope of Review.

Sentence Upheld.

Abuse of Discretion.

Defendant's motion for reduction of sentence was properly denied where his enhanced sentence for burglary was due to his ten prior felony convictions, and the fact that he committed burglary while on parole. Further, the defendant did not offer any new or additional information demonstrating that the sentence was excessive as required under this rule. *State v. Marsh*, 153 Idaho 360, 283

P.3d 107 (2011), review denied, — Idaho —, 2012 Ida. LEXIS 51 (Idaho Feb. 21, 2012).

Application.

Defendant's conviction was vacated on appeal and he sought reimbursement of the fines, fees, and restitution he had paid related to the conviction. These circumstances did not constitute the basis for correction of an illegal sentence under this rule. The sentence was legal when imposed, but upon vacation of the conviction there was no longer an order imposing the fines, fees and costs that could be corrected. *State v. Peterson*, 153 Idaho 157, 280 P.3d 184 (2012), review denied, — Idaho —, 2012 Ida. LEXIS 164 (Idaho June 22, 2012).

Correction of Sentence.

Costs and fees are not a part of the defendant's sentence, for they do not constitute punishment for the offense, but are more in the nature of fees used to finance the courts

and other state and local government operations. Thus, the district court was not authorized to add them to defendant's original sentence in a review hearing conducted under subsection (a). *State v. Steelsmith*, 153 Idaho 577, 288 P.3d 132 (2012).

Additions to a defendant's sentence made by the district court at the end of the retained jurisdiction period, which are necessary to correct a sentence that was illegal, are alterations within the court's authority under subsection (a), including imposition of a license suspension and mandatory fines that should have been part of the original sentence. *State v. Steelsmith*, 153 Idaho 577, 288 P.3d 132 (2012).

Denial of Motion Proper.

Defendant, who was convicted of aggravated assault, failed to show that a trial court abused its discretion in relinquishing jurisdiction or erred by denying defendant's motion under the rule; *United States v. Buchanan*, 59 F.3d 914 (9th Cir. 1995) did not provide an avenue through which to grant the probation that defendant requested. *State v. Bartlett*, — Idaho —, 298 P.3d 1074 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 143 (Idaho Apr. 24, 2013).

Because pictures of the 10-year-old victim were clearly pornographic, and they documented defendant's physical molestation of the victim, concurrent sentences under I.C. §§ 18-1506, former 18-1507A, and 18-1508 did not constitute an abuse of discretion, and the sentencing was not subject to correction or reduction under this rule. *State v. Overline*, — Idaho —, 296 P.3d 420 (2012), review denied, — Idaho —, 2013 Ida. LEXIS 83 (Idaho Mar. 20, 2013).

District court reasonably considered the proper factors when evaluating whether defendant's sentence was excessively harsh; there was no basis for reversing the denial of defendant's Idaho Crim. R. 35 motions. *State v. Grant*, — Idaho —, 297 P.3d 244 (2013).

Evidence.

A Rule 35 hearing, if held, takes place after the defendant has been accorded her rights at sentencing, so the sentencing judge is free to consider and decide the motion without any additional testimony. However, a trial court abuses its discretion if it unduly limits the information it considers before ruling upon such a motion. *State v. Martinez*, — Idaho —, 303 P.3d 627 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 222 (Idaho June 27, 2013).

Jurisdiction.

A district court does not possess residual jurisdiction to alter a defendant's sentence or to reinstate his probation, absent a motion under this rule, which must be filed within fourteen days after the order revoking probation. *State v. Day*, — Idaho —, 301 P.3d 655 (2013).

New or Additional Information.

Trial court did not abuse its discretion by denying defendant's motion for a sentence reduction, because he presented no new information pertaining to his sentence as to invoke this rule; his contention that he presented additional information in the form of an audiotape, where his accomplice allegedly takes responsibility for a story written about the murder, was insufficient to find an abuse of discretion. *State v. Adamcik*, 152 Idaho 445, 272 P.3d 417 (2012).

Review of Record.

Defendant's claims under Idaho's since-repealed multiple-punishment statute, former § 18-301, could not be brought in an Idaho Crim. R. 35 motion because the claims involved significant questions of fact, and it would, thus, not be clear, from the face of the record, whether everything done in furtherance of one of the crimes charged was also done in furtherance of another crime. *State v. McKinney*, 153 Idaho 837, 291 P.3d 1036 (2013).

This rule allows a district court to correct only those sentences that are illegal from the face of the record, i.e., do not involve significant questions of fact or require an evidentiary hearing. *State v. McKinney*, 153 Idaho 837, 291 P.3d 1036 (2013).

Scope of Review.

Defendant's claims under Idaho's former multiple-punishment statute, I.C. § 18-301, could not be brought in an Idaho Crim. R. 35 motion because they involved significant questions of fact which could not be resolved on the face of the record. *State v. McKinney*, 153 Idaho 837, 291 P.3d 1036 (2013).

Sentence Upheld.

A trial court does not abuse its discretion in denying defendant's motion for reduction of sentence, where the court notes the defendant's high risk for recidivism and his unwillingness or inability to comply with the law. *State v. Hansen*, — Idaho —, 303 P.3d 241 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 233 (Idaho July 18, 2013).

Rule 36. Clerical mistakes.**JUDICIAL DECISIONS****Amended Judgment of Conviction.**

Order entering a second amended judgment of conviction expressing a unified sentence of six years, with one year fixed for the offense of DUI, which the trial court said it issued to correct a clerical error in its first amended

judgment of conviction, was proper because the trial court was not imposing an amended sentence, rather it was correcting an earlier error. *State v. Moore*, 152 Idaho 203, 268 P.3d 471 (2011), review denied, — Idaho —, 2012 Ida. LEXIS 46 (Idaho Feb. 16, 2012).

Rule 41. Search and seizure.

(a) **Authority to issue warrant.** A search warrant authorized by this rule or by the Idaho Code may be issued by a district judge or magistrate within the judicial district wherein the county of proper venue is located upon request of a law enforcement officer or any attorney for the state of Idaho. Where it does not appear that the property or person sought is currently within the territorial boundaries of the state of Idaho, such warrant may still be issued; however, no such issuance will be deemed as granting authority to serve said warrant outside the territorial boundaries of the State.

(b) **Property or person which may be seized with a warrant.** A warrant may be issued under this rule to search for and seize (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, or (4) a person named in an arrest warrant issued pursuant to Rule 4 of these rules.

(c) **Issuance and content.** A warrant shall issue only on an affidavit or affidavits, which include written certifications or declarations under penalty of perjury, or by testimony under oath and recorded and establishing the grounds for issuing a warrant. If the district judge or magistrate is satisfied that there is probable cause to believe that the grounds for the application exist, the judge or magistrate shall issue a warrant identifying the property or person and naming or describing the person or place to be searched. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis, considering the totality of the circumstances, to believe probable cause exists. Before ruling on a request for a warrant the district judge or magistrate may require the affiant to appear personally and may examine under oath the affiant and any witnesses affiant may produce, provided that such proceeding shall be taken down by recording equipment and shall be considered a part of the affidavit. The warrant shall be directed to any peace officer authorized to enforce or assist in enforcing any law of the state of Idaho. It shall command the officer to search, within the specified period of time, not to exceed fourteen (14) days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and

for reasonable cause shown, authorizes its execution at times other than daytime. "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(d) **Execution and return with inventory.** The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for property taken or shall leave a copy and receipt at the place from which the property was taken. A verified return, which may be a written certification or declaration under penalty of perjury, shall be promptly made to a district court judge or magistrate in the county where a warrant for the seizure of property or a person was issued. The inventory shall be made by one of the officers executing the warrant in the presence of the person from whose possession or premises the property was taken; provided, if such person is not present, the executing officer shall make the inventory in the presence of at least one (1) credible person of age. The district judge or magistrate shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. The district judge or magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the county in which the warrant was issued or served.

(e) **Motion for return of property.** A person aggrieved by a search and seizure may move the district court for the return of the property on the ground that the person is entitled to lawful possession of the property and that it was illegally seized. The motion for the return of the property shall be made only in the criminal action if one is pending, but if no action is pending a civil proceedings may be filed in the county where the property is seized or located. The court shall receive evidence on any issue of fact necessary to the decision on the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing after a complaint, indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) **Motion to suppress.** A motion to suppress evidence shall be made in the trial court as provided in Rules 5.1(b) and 12.

(g) **Telegraphic or facsimile copy of a search warrant.** After the issuance of a search warrant in the form set forth in subsection (c) above, a copy of the search warrant may be sent by telecommunication process or by facsimile process to any peace officer or other officer serving the search warrant. (Adopted December 27, 1979, effective July 1, 1980; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended June 15, 1987, effective November 1, 1987; amended March 23, 1990, effective July 1, 1990; amended March 18, 2011, effective July 1, 2011; amended February 9, 2012, effective July 1, 2012; amended June 20, 2013, effective July 1, 2013.)

Rule 45. Time.

JUDICIAL DECISIONS

Enlargement of Time.

Pursuant to paragraph (b)(3) of this rule, the two-year limitation period in Idaho Crim. R. 34 for a motion for a new trial on the

ground of newly discovered evidence cannot be extended. *State v. Smith*, — Idaho —, 300 P.3d 1069 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 156 (Idaho May 16, 2013).

Rule 46. Bail or release on own recognizance.

JUDICIAL DECISIONS

Forfeiture of Bond.

Even if a bond surety had conclusively established that the defendant was deported, the impossibility doctrine would not have been a meritorious defense to forfeiture of the bond, as the defendant's deportation was due to his status as an illegal immigrant unlaw-

fully present in the United States, a fact that the surety knew at the time the bond agreement was entered into. Thus, the act by the federal government in deporting the defendant was not an unforeseen supervening act that would excuse performance. *State v. Two Jinn, Inc.*, 151 Idaho 725, 264 P.3d 66 (2011).

Rule 48. Dismissal by the court.

JUDICIAL DECISIONS

Jurisdiction.

Where, in 1992, the court did not amend or modify any of the final orders related to withheld judgment, but only modified the period of probation, and where the court did

not state reasons for dismissal or state that it was dismissing the case, it had continuing jurisdiction and the discretion to deny a 2010 motion to dismiss. *State v. Dieter*, 153 Idaho 730, 291 P.3d 413 (2012).

Rule 52. Harmless error.

JUDICIAL DECISIONS

ANALYSIS

Error Held Harmless.

Error Held Not Harmless.

Error Held Harmless.

Denial of defendant's motion to withdraw his guilty plea was proper because he failed to allege that he would not have pleaded guilty had he been correctly informed about the maximum sentence he faced. He also failed to present evidence or argument that would demonstrate how he was prejudiced when he had received no greater sentence than that of which he was forewarned; therefore, the al-

leged error was harmless. *State v. Thomas*, — Idaho —, 297 P.3d 268 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 94 (Idaho Mar. 25, 2013).

Error Held Not Harmless.

Trial court erred in denying defendant's motion for a presentence psychological evaluation during the sentencing phase of trial because the record demonstrated that defendant's mental condition was a significant factor in determining the sentence; the trial court's failure to order a psychological evaluation was not harmless error. *State v. Hanson*, 152 Idaho 314, 271 P.3d 712 (2012).

Rule 54.5. Stay on appeal — Powers of magistrate during appeal.

(a) **Stay in Criminal Appeals.** Execution of the sentence, if any, imposed by the trial court, shall be stayed when ordered by the magistrate or by the district court as provided in Rule 46 and this rule.

(b) **Powers of Magistrate.** The magistrate shall have the following powers and authorities to rule upon the following motions and to take the following actions during the pendency of appeal unless otherwise prohibited by order of the district court:

- (1) Settle the transcript on appeal.
- (2) Rule upon any motion for new trial.
- (3) Rule upon any motion for arrest of judgment.
- (4) Conduct any hearing, and make any order, decision or judgment allowed or permitted by section 19-2601, Idaho Code.
- (5) Conduct any hearing and make any order, decision or judgment with regard to a withheld judgment entered upon a plea or verdict of guilty.
- (6) Place a defendant upon probation, modify or revoke such probation, or sentence a defendant upon revocation of probation.
- (7) In the event bail is not posted pursuant to section 19-3941, Idaho Code, the court may determine and order whether there shall be a stay of execution of the sentence upon a judgment of conviction during the pendency of an appeal to the district court; provided, however, any order of the district court with regard to such a stay shall take precedence over and supersede any order made by the magistrate.
- (8) Enter any other order after judgment affecting the substantial rights of the defendant as authorized by law. Provided, however, in the event the district court shall enter an order affecting a stay of execution of a sentence, provisions concerning bail, or any of the other matters set forth above, such order of the district court shall take precedence over and supersede the order of the magistrate. (Adopted June 15, 1987, effective November 1, 1987; amended October 6, 2013, effective January 1, 2014.)

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MISDEMEANOR CRIMINAL RULES

Rule

6. First appearance of defendant — Plea of defendant — Trial date notice or continuance notice.

Rule 6. First appearance of defendant — Plea of defendant — Trial date notice or continuance notice.

(a) **First Appearance and Plea Before Clerk of the Court.** Except as provided in Rule 5(b), the defendant shall first appear before the clerk on or before the appearance date to enter a plea to a misdemeanor citation or complaint.

(1) **Continuance.** If, at the first appearance, the defendant desires additional time before entering a plea to the charge, the clerk shall continue the proceeding to a time certain and issue a continuance notice to the defendant in the form prescribed in this rule.

(2) **Plea of Not Guilty.** If the defendant enters a plea of not guilty, the clerk shall register the same and issue to the defendant a trial date notice in the form prescribed by this rule.

(3) **Plea of Guilty to Citation.** If the defendant desires to enter a plea of guilty to a misdemeanor citation, and if the clerk is authorized to accept such a plea and fine under Rule 14, the clerk shall accept the plea of guilty by having the defendant sign a written plea of guilty on the face of the court's copy of the citation and collect the fine and court costs as provided by Rule 14. The defendant must first acknowledge that he has read the advice on the backside of the defendant's copy of the citation. All other pleas of guilty may be filed with the clerk, but must be accepted by the court.

(b) **Plea Before the Court.** The defendant shall have the right to enter a plea to a misdemeanor citation or complaint before the court. If the defendant enters a plea of not guilty, a trial date notice shall be issued to the defendant in the form provided by this rule, and the bail bond, if any, shall be set by the court. If the defendant enters a plea of guilty, the court may thereupon impose the sentence or may appoint a later time for imposing sentence.

(c) **Duties of Court to Advise Defendant of Rights.** At the first appearance of the defendant before the court on a uniform citation or sworn complaint, the court shall inform the defendant of his constitutional rights and the rights provided in the Idaho Criminal Rules, and these rules. Such advice of rights may be announced to all defendants at each session of court at the commencement of the court hearing, rather than advising each of the defendants individually when they come before the court. If the offense has a permissible penalty of imprisonment, or if the conviction of the offense could cause a subsequent conviction to be enhanced from a misdemeanor to a felony, then or in either of such events the defendant shall be advised that he has the right to court appointed counsel at public expense if he is

indigent. If the defendant is found by the court to be entitled to court appointed counsel, the court shall appoint such counsel unless the defendant voluntarily waives his right to counsel.

(d) **Appearance by Defendant Through Attorney.** Except as provided in Rule 5(b), a defendant may also appear, answer and have judgment entered through an attorney, who shall either appear in person or shall file, at or before the time for appearance, a written appearance and answer on behalf of the defendant. The court may, in its discretion, require the presence of the defendant at any stage of the proceeding not otherwise required by these rules.

(e) **Trial Date Notice or Continuance Notice.** Whenever a defendant is given a trial date setting or a continuance at or after the defendant’s first appearance, such notice shall be given by a written notice delivered to the defendant in substantially the following form:

(1) **Trial Date Notice:**

STATE OF IDAHO

Plaintiff,

vs.

Defendant.

[Court Heading]

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TRIAL DATE NOTICE

NOTICE IS HEREBY GIVEN to the above Defendant that the trial before the court has been set for the charge against you at _____ o'clock ____M. on the _____ day of _____, 20 ____, in the courtroom of the above court.

☐ THIS CHARGE IS AN INFRACTION — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial, judgment will be entered against you for the infraction violation and the penalty in the sum of \$ _____. In addition, a copy of the judgment will be forwarded to the Idaho Department of Transportation which may count as driver violation points against you, or be forwarded to your home state pursuant to the Interstate Nonresident Violator Compact. IF YOU THEREAFTER FAIL TO PAY THE PENALTY, YOUR DRIVER’S LICENSE MAY ALSO BE SUSPENDED IF THIS IS A TRAFFIC INFRACTION.

☐ THIS CHARGE IS A MISDEMEANOR — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial any bond posted may be forfeited by the court and a warrant may issue for your arrest without further notice.

58

- ☐ Personally delivered to the defendant this date.
- ☐ Mailed to the defendant this date.

Private Counsel: _____
Mailed _____ Hand Delivered _____

Prosecutor: _____
Mailed _____ Hand Delivered _____

Dated _____

Clerk or Judge

(2) Continuance Notice:

STATE OF IDAHO

Plaintiff,

vs.

Defendant.

[Court Heading]

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CONTINUANCE NOTICE

NOTICE IS HEREBY GIVEN to the above Defendant that proceedings on the charge against you have been continued until _____ o'clock ____ .M. on the ____ day of ____, 20 ____, in the courtroom of the above court.

☐ THIS CHARGE IS AN INFRACTION — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial, judgment will be entered against you for the infraction violation and the penalty in the sum of \$ _____. In addition, a copy of the judgment will be forwarded to the Idaho Department of Transportation which may count as driver violation points against you, or be forwarded to your home state pursuant to the Interstate Nonresident Violator Compact. IF YOU THEREAFTER FAIL TO PAY THE PENALTY, YOUR DRIVER'S LICENSE MAY ALSO BE SUSPENDED IF THIS IS A TRAFFIC INFRACTION.

☐ THIS CHARGE IS A MISDEMEANOR — YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial any bond posted may be forfeited by the court and a warrant may issue for your arrest without further notice.

- ☐ Personally delivered to the defendant this date.
- ☐ Mailed to the defendant this date.

Private Counsel: _____
Mailed _____ Hand Delivered _____

Prosecutor: _____
Mailed _____ Hand Delivered _____

Dated _____

Clerk or Judge

(Adopted April 18, 1983, effective July 1, 1983; amended February 10, 1993, effective July 1, 1993; amended March 9, 1999, effective July 1, 1999; amended March 5, 2002, effective July 1, 2002; amended April 2, 2010, effective April 15, 2010; amended March 18, 2011, effective July 1, 2011; amended June 25, 2013, effective July 1, 2013.)

IDAHO JUVENILE RULES

PART II. JUVENILE CORRECTIONS ACT (J.C.A.) PROCEEDINGS.

Rule 6. Admit/deny hearing — Nature of proceeding — Notice — Explanation of rights — Plea — Setting of evidentiary hearing (J.C.A.)

CASE NOTES

In General.

Subsection (j) of this rule supports and carries into effect the terms of § 20-511. State v. Doe, 153 Idaho 588, 288 P.3d 805 (2012).

Rule 11. Informal adjustment (J.C.A.)

CASE NOTES

Alternate Sentencing.

Formal sentencing and informal adjustment are mutually exclusive pathways for resolving juvenile petitions. Therefore, the juvenile defendant is subject to either formal sentencing or informal adjustment. Once the

magistrate court formally sentences a juvenile to two years' probation under § 20-520(1)(a), it has no authority to convert the judgment into an informal adjustment under § 20-511 and this rule. State v. Doe, 153 Idaho 588, 288 P.3d 805 (2012).

PART III. CHILD PROTECTIVE ACT PROCEEDINGS (C.P.A.)

Rule 33. Summons (C.P.A.)

CASE NOTES

Voluntary Appearance.

Failure to personally serve the father in a child protective act proceeding, in accordance with subsection (a), was of no effect in a termination of parental rights proceeding, be-

cause the father's voluntary general appearance was equivalent to service of summons and cured any defects in service. Idaho Dep't of Health & Welfare v. Doe (In re Doe), — Idaho —, 296 P.3d 381 (2013).

Rule 44. Case Plan Hearing — Permanency Hearing.

CASE NOTES

Delay not Determinative.

Delay in developing the father's case plan under this rule, in a child protective act proceeding, did not affect the outcome of the termination of parental rights proceeding, because the magistrate's finding of neglect un-

der § 16-2002(3) was supported on a prong of neglect, independent of case plan performance. Idaho Dep't of Health & Welfare v. Doe (In re Doe), — Idaho —, 296 P.3d 381 (2013).

IDAHO COURT ADMINISTRATIVE RULES

Rule

32. Records of the judicial department — Examination and copying — Exemption from and limitations on disclosure.

Rule

71. Exhibits.

72. Discipline, removal, or involuntary retirement of a justice or judge.

RULES GOVERNING THE ADMINISTRATION AND SUPERVISION OF THE UNIFIED AND INTEGRATED IDAHO JUDICIAL SYSTEM.

PART IV. COURT RECORDS REQUIRED; PRESERVATION, DESTRUCTION, OR DISPOSITION OF COURT RECORDS.

Rule 32. Records of the judicial department — Examination and copying — Exemption from and limitations on disclosure.

(a) **Statement of policy.** This rule is adopted pursuant to the Supreme Court's authority to control access to court records, as recognized in the Idaho Public Records Act, I.C. § 9-340A. The public has a right to examine and copy the judicial department's declarations of law and public policy and to examine and copy the records of all proceedings open to the public. This rule provides for access in a manner that:

- (1) Promotes accessibility to court records;
- (2) Supports the role of the judiciary;
- (3) Promotes governmental accountability;
- (4) Contributes to public safety;
- (5) Minimizes the risk of injury to individuals;
- (6) Protects individual privacy rights and interests;
- (7) Protects proprietary business information;
- (8) Minimizes reluctance to use the court system;
- (9) Makes the most effective use of court and clerk of court staff;
- (10) Provides excellent customer service; and
- (11) Avoids unduly burdening the ongoing business of the judiciary.

In the event of any conflict this rule shall prevail over any other rule on the issue of access to judicial records.

(b) **Definitions:** As used in this Rule:

(1) "Custodian" means the person defined in paragraph (j)(2) of this Rule.

(2) "Custodian judge" means the Justice, Judge or Magistrate defined in paragraph (j)(3) of this Rule.

(3) "Personnel" means justices, judges, magistrates, trial court administrators, clerks of the district court and staff of a court.

(4) "Court record" includes:

(A) Any document, information or other thing that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding;

(B) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in an automated case management system created by or prepared by the court or clerk of court that is related to a judicial proceeding, including existing ISTARS reports.

(5) "Physical record" means a judicial branch record, including a court record, that exists in physical form, irrespective of whether it also exists in electronic form.

(6) "Electronic form" means a court record that exists as:

(A) Electronic representations of text or graphic documents;

(B) An electronic image, including a video image, of a document, exhibit or other thing;

(C) Data in the fields or files of an electronic database; or

(D) An audio or visual recording, analog or digital, of an event or notes in an electronic file from which a transcript of an event can be prepared; irrespective of whether it also exists in physical form.

(7) "Remote access" means the ability whereby a person may electronically search, examine and copy court information maintained in a court record by means of access via the Internet or other publicly available telecommunication mechanism.

(8) "Bulk Distribution" means the distribution of all, or a significant subset of the information in court records in electronic form, as is, and without modification or compilation.

(9) "ISTARS" means the automated trial court case management system used to support the operations of the trial courts.

(10) "Compiled Data Information" means information that is derived from the selection, aggregation or reformulation by the court of some of the information from more than one individual court record.

(c) **Applications.** This Rule shall apply to all court records existing on or after the date of adoption of this Rule. Provided, this Rule shall not prevent access to records, otherwise exempt from disclosure by the following persons in the following situations:

(1) If approved by the custodian judge, or the custodian in the case of any record in the judicial council, federal, state and local officials or their agent examining a judicial record in the exercise of their official duties and powers; however, requests for numerous records or records from more than one county must be approved by the Chief Justice.

(2) Parties to an action and their attorney examining the court file of the action, unless restricted by order of the court, except as limited in paragraphs (g)(11), (12), (15) and (17)(F).

(3) Disclosure by the custodian of statistical information that is not descriptive of identifiable persons.

(4) Employees shall have access to their own personnel files.

(5) Judges, clerks, trial court administrators, or other staff employed by or working under the supervision of the courts who are acting within the scope of their duties.

(d) **Access to Court Records, Examination and Copying.** Except as provided in paragraphs (g) and (i), the following are subject to examination, inspection and copying.

(1) Minutes, orders, opinions, findings of fact, conclusions of law, and judgments of a court and notices of the clerk of the court;

(2) Transcripts and recordings of all trials and hearings open to the public;

(3) Pleadings, motions, affidavits, responses, memoranda, briefs and other documents filed or lodged in a case file;

(4) Administrative or other records of the clerk, justice, judge, magistrate or staff of the court unless exempt from disclosure by statute, case law, or court rule; and

(5) A court record that has been offered or admitted into evidence in a judicial action or that a court has considered as evidence or relied upon for purposes of deciding a motion; except that, before final disposition by the trial court, access to any exhibit shall be allowed only with the permission of the custodian judge subject to any conditions set by the custodian judge and shall take place under the supervision of the office of the court clerk. The public shall not have access at any time to items of contraband or items that pose a health or safety hazard; for example, drugs, weapons, child pornography, toxic substances, or bodily fluids, without permission of the custodian judge.

(e) **Access to Records Maintained in Electronic Form (Electronic Records).**

(1) The public shall have access to the following if they exist in electronic form:

(A) Litigant/party indexes to cases filed with the court;

(B) Listings of new case filings, including the names of the parties;

(C) The chronological case summary of events;

(D) Calendars or dockets of court proceedings, including case numbers and captions, date and time of hearings, and location of hearings and;

(E) Final judgments, orders, or decrees.

Except as provided in paragraphs (g) and (i), the Supreme Court may provide such access from terminals at judicial branch facilities or on-line from any remote location over the Internet.

(2) The public shall not have access to the following data elements in an electronic case record with regard to parties or their family members: the first six characters of social security numbers; street addresses; telephone numbers; and any personal identification numbers, including motor vehicle operator's license numbers and financial account numbers.

(f) **Compiled Information.** Any member of the public may request copies of existing compiled information that consists solely of information

that is not exempt from disclosure. In addition, the Supreme Court may compile and provide the information if it determines, in its discretion, that the resources are available to compile the information and that it is an appropriate use of public resources. The Supreme Court may delegate to its staff the authority to make the initial determination as to whether to provide the compiled information.

Compiled information that includes information to which public access has been restricted may be requested from the Supreme Court by any member of the public. The request shall:

- (1) identify what information is sought,
- (2) describe the purpose for requesting the information and explain how the information will benefit the public interest or public education, and
- (3) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited.

The response to the request shall be made by the Supreme Court within ten (10) working days following the date of the request.

(g) **Court records exempt from disclosure.** Except as provided in paragraph (h) of this rule, court records specified below are confidential and are exempt from disclosure. Any willful or intentional disclosure of a confidential court record may be treated as a contempt of court.

(1) Documents and records to which access is otherwise restricted by state or federal law;

(2) Pre-sentence investigation reports, except as provided in Idaho Criminal Rule 32;

(3) Affidavits or sworn testimony and records of proceedings in support of the issuance of search or arrest warrant pending the return of the warrant;

(4) Unreturned search warrants;

(5) Unreturned arrest warrants, except bench warrants, or summonses in a criminal case, provided that the arrest warrants or summonses may be disclosed by law enforcement agencies at their discretion;

(6) Unless otherwise ordered by the custodian judge, applications made and orders granted for the interception of wire, electronic or oral communications pursuant to Idaho Code § 18-6708, recordings of intercepted communications provided to the court, and reports made to the court regarding such interceptions under Idaho Code § 18-6708(7);

(7) Except as provided by Idaho Criminal Rules or statutes, records of proceedings and the identity of jurors of grand juries;

(8) Except as provided by the Idaho Criminal Rules or Idaho Rules of Civil Procedure, the names of jurors placed in a panel for a trial of an action and the contents of jury qualification forms and jury questionnaires for these jurors, unless ordered to be released by the presiding judge;

(9) Juvenile court records as hereinafter provided:

(A) All court records of Child Protective Act proceedings.

(B) All court records of Juvenile Corrections Act proceedings on a petition filed under I.C. § 20-510 pending an admit/deny hearing held

pursuant to Rule 6, I.J.R. to permit the parties to request that the court consider, or permit the court to consider on its own motion, closing the records and files. Thereafter the court records shall be open unless the court enters an order exempting them from disclosure. At the admit/deny hearing the court shall determine whether the court records shall remain exempt from disclosure as provided in 1. and 2. below:

1. Court records of Juvenile Corrections Act proceedings brought against a juvenile under the age of fourteen (14), or brought against a juvenile fourteen (14) years or older who is charged with an act that would not be a felony if committed by an adult, shall be exempt from disclosure if the court determines by a written order in each case that the records should be closed to the public.

2. Court records of Juvenile Corrections Act proceedings brought against a juvenile fourteen (14) years or older who is charged with an act which would be a felony if committed by an adult, shall be exempt from disclosure if the court determines upon a written order made in each case that extraordinary circumstances exist which justify that the records should be confidential.

(C) If a juvenile fourteen (14) years or older who is charged with an act which would be a felony if committed by an adult is not found to have committed an act which would be a felony if committed by an adult or the charge is reduced to allege an act which would not constitute a felony if committed by an adult, all existing and future case records and documents shall be exempt from disclosure if the court determines by written order in each case that the court records should be closed to the public.

(D) Notwithstanding any other provision of paragraph (g)(9) of this rule, reports prepared pursuant to I.C. § 20-520(1), and other records and reports described in paragraph (g)(17) of this rule are exempt from disclosure.

(E) Notwithstanding any other provision of paragraph (g)(9) of this rule, if a juvenile is adjudicated guilty of an act which would be a criminal offense if committed by an adult, the name, offense, and disposition of the court shall be open to the public.

(F) Notwithstanding any other provision of paragraph (g)(9) of this rule, the court shall make available upon the written request of a superintendent or an employee of the school district authorized by the board of trustees of the school district, the facts contained in any records of a juvenile maintained under Chapter 5, Title 20, Idaho Code. If a request is made to examine records in courts of multiple districts, it shall be ruled upon by the Chief Justice.

(10) Mental commitment case records; provided, the court may disclose these records when consented to by the person identified or his or her legal guardian, or the parent if the individual is a minor. The court in its discretion may make such records available to the spouse, or the immediate family of the person who is the subject of the proceedings;

(11) Adoption records, except that an adopted person may obtain non-identifying medical information in all cases; the court may also in its discretion make information from the adoption records available, upon such conditions as the court may impose, to the person requesting the record, if the court finds upon written verification of a medical doctor a compelling medical need for disclosure;

(12) Records of proceedings to terminate the parent and child relationship under Chapter 20 of Title 16, Idaho Code, except that the child may obtain non-identifying medical information in all cases, and the court may also in its discretion make information from the records available, upon such conditions as the court may impose, to the person requesting the record, if the court finds upon written verification of a medical doctor a compelling medical need for disclosure;

(13) All records of proceedings relating to the consent required for abortion for minors brought pursuant to I.C. 18-609A(1) or (3);

(14) All records of proceedings relating to the judicial authorization of sterilization procedures pursuant to I.C. 39-3901;

(15) Documents filed or lodged with the court in camera;

(16) Domestic abuse files maintained pursuant to domestic violence crime prevention acts, except orders of the court;

(17) Records maintained by a court that are gathered at the request or under the auspices of a court (other than records that have been admitted in evidence);

(A) to determine an individual's need for counseling, rehabilitation, treatment or assistance with personal conflicts;

(B) to assist in assigning an appropriate disposition in the case, including the ADR screening report and screening reports prepared by Family Court Service coordinators or their designees;

(C) to provide the court with a recommendation regarding the custody of minor children;

(D) to provide a court with a psychological evaluation of an individual;

(E) to provide annual or other accountings by conservators and guardians, except to interested parties as defined by Idaho law;

(F) the family law case information sheet.

(18) A reference list of personal data identifiers or an unredacted copy of a document filed pursuant to I.R.C.P. 3(c).

(19) All court filings, including attachments, in guardianship or conservatorship proceedings whether temporary or permanent, and whether for an adult, a minor, or a developmentally disabled person, except to interested persons as defined in section 15-1-201, Idaho Code, guardians ad litem, court visitors, or any monitoring entity as defined by Idaho law, or any attorney representing any of the foregoing; provided, however, the following shall not be exempt from disclosure:

(A) the register of actions for the case;

(B) letters of guardianship and letters of conservatorship, and any supplemental orders, decrees or judgments describing, limiting, or expanding the rights and duties of the guardian or conservator;

(C) any order by the court regarding bond by a conservator, and the conservator's bond;

(D) any order, decree, or judgment dismissing, concluding, or otherwise disposing of the case.

(20) The records in cases involving child custody, child support, and paternity, except that officers and employees of the Department of Health and Welfare shall be able to examine and copy such records in the exercise of their official duties; and provided further that the following shall not be exempt from disclosure to any person:

(A) the register of actions for the case;

(B) any order, decree or judgment issued in the case, which shall be drafted and issued in compliance with the provisions of Rule 3(c)(4) of the Idaho Rules of Civil Procedure.

This subsection (g)(20) shall apply only to records in cases filed on or after July 1, 2012, and to records in cases in which a motion to modify an order, decree, or judgment was filed on or after July 1, 2012.

(21) Records of judicial work product or drafts, including all notes, e-mail, memoranda or drafts prepared by a judge or a court-employed attorney, law clerk, legal assistant or secretary;

(22) Personnel records, application for employment and records of employment investigations and hearings, including, but not limited to, information regarding sex, race, marital status, birth date, home address, telephone number, applications, testing and scoring materials, grievances or complaints against an employee, correspondence, and performance evaluations; provided the following are not exempt from disclosure: a public official's public service or employment history, classification, pay grade and step, longevity, gross salary and salary history, status, workplace, employing agency, and any adverse official action taken against an employee as a result of a grievance or complaint (except a private letter of reprimand), and after such action is taken (except when the action is a private letter of reprimand), the record of any investigation and hearing leading to the action;

(23) Applications, testing and scoring to be included on a court maintained roster;

(24) Computer programs and related records, including but not limited to technical and user manuals, which the judicial branch has acquired and agreed to maintain on a confidential basis;

(25) Records maintained by the state law library that link a patron's name with materials requested or borrowed in the patron's name with a specific subject about which the patron has requested information or materials;

(26) Allegations of attorney misconduct received by the Idaho State Bar and records of the Idaho State Bar relating to attorney discipline, except where confidentiality is waived under the Idaho Bar Commission Rules;

(27) All records relating to applications for permission to take the Idaho bar examination or for admission to practice as exempted from disclosure in the Idaho Bar Commission Rules;

(28) All records and records of proceedings, except the identity of applicants for appointment to judicial office, of the Idaho Judicial Council or any District Magistrates Commission pertaining to the appointment, performance, removal, disability, retirement or disciplining of judges or justices. Provided, however, that the record of a disciplinary proceeding filed by the Judicial Council in the Supreme Court loses its confidential character upon filing;

(29) Bulk distribution of electronic court data is not allowed. However, at its discretion, the Supreme Court may grant requests for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes where the identification of specific individuals is ancillary to the purpose of the inquiry.

(h) Permissive Release of Judicial Decision in Exempted Categories. Records of courts' determinations in proceedings exempt from disclosure under (g) of this rule may, by direction of the court issuing the determination, be subject to inspection, examination and copying in a manner that preserves the anonymity of the participants to the proceeding. In particular, the Supreme Court and the Court of Appeals may provide copies of their rulings in appeals from proceedings exempt from disclosure under paragraph (g) by using "John Doe/Jane Doe" designations or other anonymous designations in documents made available for inspection, examination and copying. Further deletions from the decisions may be made if necessary to preserve anonymity.

(i) Other Prohibitions or Limitations on Disclosure and Motions Regarding the Sealing of Records. Physical and electronic records may be disclosed, or temporarily or permanently sealed or redacted by order of the court on a case-by-case basis. Any person or the court on its own motion may move to disclose, redact, seal or unseal a part or all of the records in any judicial proceeding. The custodian judge shall hold a hearing on the motion after the moving party gives notice of the hearing to all parties to the judicial proceeding and any other interested person, guardian ad litem, court visitor, ward or protected person, personal representative, guardian, or conservator designated by the custodian judge. In ruling on whether specific records should be disclosed, redacted or sealed by order of the court, the court shall determine and make a finding of fact as to whether the interest in privacy or public disclosure predominates. If the court redacts or seals records to protect predominating privacy interests, it must fashion the least restrictive exception from disclosure consistent with privacy interests. Before a court may enter an order redacting or sealing records, it must also make one or more of the following determinations in writing:

(1) That the documents or materials contain highly intimate facts or statements, the publication of which would be highly objectionable to a reasonable person, or

(2) That the documents or materials contain facts or statements that the court finds might be libelous, or

(3) That the documents or materials contain facts or statements, the dissemination or publication of which may compromise the financial security of, or could reasonably result in economic or financial loss or harm to a person having an interest in the documents or materials, or compromise the security of personnel, records or public property of or used by the judicial department, or

(4) That the documents or materials contain facts or statements that might threaten or endanger the life or safety of individuals, or

(5) That it is necessary to temporarily seal or redact the documents or materials to preserve the right to a fair trial.

In applying these rules, the court is referred to the traditional legal concepts in the law of the right to a fair trial, invasion of privacy, defamation, and invasion of proprietary business records as well as common sense respect for shielding highly intimate or financially sensitive material about persons. When a record is sealed under this rule, it shall not be subject to examination, inspection or copying by the public. When the court issues an order sealing or redacting records, the court shall also inform the Clerk of the District Court of which specific files, documents and ISTARS records are to be sealed or redacted. Sealed files shall be marked "sealed" on the outside of the file. Sealed or redacted records shall be placed in a manila envelope That the documents or materials contain facts or statements that might threaten or endanger the life or safety of individuals. marked "sealed" with a general description of the records, their filing date and date they were sealed or redacted. When a file has been ordered sealed, or when records within a file have been ordered sealed or redacted, the electronic record shall reflect such action and shall be limited accordingly. When the court issues an order redacting records for purposes of public disclosure, the records in the court file or in the custody of the court shall not be altered in any fashion. The originals shall be placed in a manila envelope marked "sealed" with a general description of the records, and a redacted copy, so marked, shall be substituted for the originals in the court file. An order directing that records be redacted or sealed shall be subject to examination, inspection or copying by the public to the extent that such disclosure does not reveal the information that the court sought to protect in issuing the order. The decision on a motion to redact, seal or unseal records may be reconsidered, altered or amended by the court at any time. When the court issues an order disclosing otherwise exempt records, it shall place appropriate limitations on the dissemination of that information.

(j) Request for Records.

(1) Any person desiring to inspect, examine or copy physical records shall make an oral or written request to the custodian. If the request is oral, the custodian may require a written request. The custodian may request contact information as provided in I.C. § 9-338(4). A request for public records and delivery of the public records may be made by

electronic mail. The request must clearly identify each record requested so that the custodian can locate the record without doing extensive research and continuing requests for documents not yet in existence will not be considered. The custodian may provide the requester information to help the requester narrow the scope of the request or to help the requester make the request more specific when the response to the request is likely to be voluminous.

(2) **Custodian Defined.** The custodian of judicial public records is designated as follows:

(A) For any record in a case file in the Supreme Court or Court of Appeals, the custodian is the Clerk of the Supreme Court or a deputy clerk designated in writing.

(B) For any record not in a case file in the Supreme Court or Court of Appeals, the custodian is the Administrative Director of the Courts or other person designated in writing by the Chief Justice.

(C) For any record in a case file in a district court or magistrate court, the custodian is the Clerk of the District Court or a deputy clerk designated in writing.

(D) For any record not in a case file in the district court or magistrate court, the custodian is the Trial Court Administrator of the judicial district, or judge or magistrate designated by the Administrative District Judge.

(E) For any record in the judicial council, the custodian is the Executive Director of the Judicial Council.

(F) For any record in the Idaho State Bar, the custodian is the Executive Director of the Idaho State Bar or other person designated in writing by the Idaho State Bar Commissioners.

(G) For the purposes of the ISTARS system, the ISTARS Datawarehouse, and compiled information, the custodian is the Administrative Director of the Courts or other person designated in writing by the Chief Justice.

(3) **Custodian Judge.** The custodian judge of a judicial public record is designated as follows:

(A) For any record in the Supreme Court, ISTARS or the ISTARS Datawarehouse the custodian judge is the Chief Justice, or the Vice-Chief Justice in the absence of the Chief Justice.

(B) For any record in the Court of Appeals, the custodian judge is the Chief Judge of the Court of Appeals, or a Judge of the Court of Appeals designated in writing.

(C) For any record in a case file in the district court or magistrate court, the custodian judge is the presiding magistrate or judge of that case, or judge or magistrate designated in writing by the Administrative District Judge.

(D) For any record not in a case file in the district court or magistrate court, the custodian judge is the Administrative District Judge of that judicial district, or other district judge or magistrate designated in writing by the Administrative District Judge.

(E) For any record in the judicial council, the custodian judge is the Chief Justice or the Vice-Chief Justice in the absence of the Chief Justice.

(F) For any record in the Idaho State Bar, the custodian judge is the Administrative District Judge of the Fourth Judicial District of the State of Idaho or a district judge designated in writing by the Administrative District Judge.

(4) **Response to Request.** The custodian shall respond to a request for examination of public records. Within three (3) working days from receipt of request, the custodian shall disclose the records requested, refer the request to the custodian judge for determination, or give written notice of denial of the request. Provided, if the custodian determines that it will take more than three (3) working days to determine whether the request should be granted, or that a longer period of time is needed to locate or retrieve the requested records, the custodian shall so notify the person making the request, and the response shall then be made by the custodian within ten (10) working days following the date of the request. If the documents requested are disclosed by the custodian, no other notice need be given by the custodian. The custodian is not under a duty to compile or summarize information contained in records, nor is the custodian obligated to create new records for the requesting party, except as provided herein. The custodian may deny a request for a copy of all or part of a transcript of an administrative or judicial proceeding or other voluminous publication or document when by rule or statute it may be obtained from the preparer of such record after payment of a fee. Efforts should be made to respond promptly to requests for records.

(5) **Response by Custodian Judge.** If a custodian determines that there is a question as to whether records should be disclosed pursuant to a request, or if a request is made for a ruling by a judge after the custodian denies the request, the custodian shall refer the request to the custodian judge for determination. The custodian judge shall make a written determination as to whether the records should be disclosed within ten (10) working days following the request. In the sole discretion of the custodian judge, an informal hearing may be held by the custodian judge on the question of whether the records should be disclosed. The custodian judge shall determine the time and place of the hearing and the notice to be given by the custodian to the person requesting the records and any other interested person. If a hearing is held under this rule, the response to the person requesting the record may be delayed a reasonable time after the conclusion of the hearing.

(6) **Cost of Copying Records.** The cost to make a paper copy of any record filed in a case with the clerk of the district court shall be as specified in I.C. § 31-3201. The cost for any other copying of any record shall be determined by order of the Supreme Court or the Administrative District Judge in accordance with the provisions of I.C. § 9-338(8). The costs so determined shall be paid, in advance, by the person requesting

the records. Any delay in paying the costs of copying the records shall extend the time for response by the custodian. In the event that a person wishes to have a copy of a court record that can be easily copied to digital media by court personnel, the person making that request shall provide the appropriate media to the court for that purpose.

(7) **Proceedings after Denial.** If a custodian denies a request for the examination or copying of records, the aggrieved party may file a request for a ruling by the custodian judge. If the custodian judge denies a request for the examination or copying of records, the sole remedy of any aggrieved person shall be to institute proceedings for disclosure in the district court in accordance with I.C. § 9-343. (Adopted April 26, 2007, effective July 1, 2007; amended December 30, 2008, effective February 1, 2009; amended March 18, 2011, effective July 1, 2011; amended March 29, 2012, effective July 1, 2012; amended April 27, 2012, effective July 1, 2012; amended October 5, 2013, effective January 1, 2014.)

JUDICIAL DECISIONS

ANALYSIS

Burden of Proof.
Court Discretion.
Expungement.
Record Not Exempt from Disclosure.

Burden of Proof.

The text of the rule does not place a burden on the state to demonstrate the public interest in disclosure after the defendant showed that he had sustained economic harm because his records were not sealed. *State v. Gurney*, 152 Idaho 502, 272 P.3d 474 (2012).

Court Discretion.

Subsection (i) gives a court discretion to consider the many types of economic or financial loss that may be reasonably asserted as a claimed justification for sealing court records, including financial harm asserted by those convicted of crimes. Because the public interest in access to criminal court records is obviously weighty, it would be an exceptional circumstance where a custodian judge would find that interest exceeded by a convicted person's assertion of economic harm flowing from a conviction. *Doe v. State*, 153 Idaho 685, 290 P.3d 1277 (2012), review denied, — Idaho —, 2013 Ida. LEXIS 12 (Idaho Jan. 8, 2013).

Expungement.

The sealing or sequestration of records under subsection (i) of this rule does not provide the relief which is available under § 20-525A; namely, the right to respond to inquiry of the matter as if the sealed case had never occurred, and the more restrictive type of expungement where the records are available only upon order of a court of competent jurisdiction and inspection is limited to the person who is the subject of the record, not interested parties upon motion to the court. *State v. Doe*, — Idaho —, 305 P.3d 543 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 268 (Idaho Aug. 29, 2013).

Record Not Exempt from Disclosure.

District court did not err in denying defendant's motion to seal his criminal case on the ground of economic hardship, where the court properly determined that the public interest in disclosure predominated over defendant's privacy interests, even though defendant presented evidence of economic harm suffered as he sought employment and housing. *State v. Gurney*, 152 Idaho 502, 272 P.3d 474 (2012).

Cited in: *State v. Marsh*, 153 Idaho 360, 283 P.3d 107 (2011).

Rule 40. Appellate court records.

JUDICIAL DECISIONS

Prevailing Party.

Even though a judgment had been certified as final pursuant to I.R.C.P. Rule 54(b), be-

cause the certified judgment did not dispose of all of the parties' claims, an appellate court could not determine the prevailing party and

could not award attorney fees. *Asbury Park, LLC v. Greenbriar Estate Homeowner's Ass'n*, 152 Idaho 338, 271 P.3d 1194 (2012).

PART V. OTHER COURT STANDARDS AND PROCEDURES.

Rule 41. Court facilities.

JUDICIAL DECISIONS

Prevailing Party.

Even though a judgment had been certified as final pursuant to I.R.C.P. Rule 54(b), because the certified judgment did not dispose of all of the parties' claims, an appellate court

could not determine the prevailing party and could not award attorney fees. *Asbury Park, LLC v. Greenbriar Estate Homeowner's Ass'n*, 152 Idaho 338, 271 P.3d 1194 (2012).

Rule 59. Vexatious litigation.

CASE NOTES

ANALYSIS

Constitutionality.
Prior Determinations.
Procedure.

Constitutionality.

The language of this rule is not unconstitutionally vague. *Telford v. Nye*, — Idaho —, 301 P.3d 264 (2013).

Prior Determinations.

There is no time limit on how old court

orders, finding a person to be a vexatious litigant in another state or a federal court, may be in a vexatious litigant hearing under paragraph (d)(4). *Telford v. Nye*, — Idaho —, 301 P.3d 264 (2013).

Procedure.

The Idaho rules of civil procedure are not applicable to proceedings brought under this rule. *Telford v. Nye*, — Idaho —, 301 P.3d 264 (2013).

PART VII. PRESERVATION OF EVIDENCE.

Rule 71. Exhibits.

Storage and handling of exhibits shall be carried out using the following procedures; except as otherwise ordered by the Court:

(a) All exhibits must be individually tagged with the proper exhibit tag, properly completed and securely attached to the exhibit.

(b) Exhibits that are withdrawn remain listed on the exhibit list (and the withdrawal noted), but are not retained by the clerk. Exhibits that are denied admittance into evidence remain listed on the exhibits list (with the denial noted), and are retained by the clerk unless return to the attorney/party is specifically ordered by the court.

(c) If counsel or the court takes an exhibit from the clerk during trial, the clerk shall make a note of the number of the exhibit and who has taken it.

(d) No exhibit containing animal or bodily fluids and/or human or animal body fluid stains or parts, or dangerous, controlled or toxic substances shall be accepted by the clerk unless it is placed in a container that is securely sealed and protected against breakage so that odors cannot be emitted and court personnel are safeguarded. Containers of controlled substances must

be clearly marked, identified and sealed. The party offering such evidence shall be responsible to ensure that the evidence is properly packaged prior to being brought into the courtroom.

(e) Narcotics, weapons, money, valuable or sensitive materials, while in the custody of the court, shall be secured in a locked facility during court recesses, lunch hours, and at other times when exhibits are unattended by the courtroom clerk or bailiff. Oversized exhibits, except for sensitive or dangerous items, may be stored in the courtroom overnight, if the courtroom is kept locked.

(f) When a dangerous, large or bulky exhibit that has been marked and identified or received in evidence poses a security, storage or safety problem, on recommendation of the clerk and stipulation of the parties, the court may order that all or a portion of it be returned to the party that offered it. In the case of exhibits offered by the prosecutor in a criminal case, the court may order that the exhibits be returned to the law enforcement agency involved. The order shall require that a full and complete photographic record of the exhibit or the portion returned be substituted for the exhibit. The party who offered the exhibit shall provide the photographic record. The party or agency to whom the exhibit is returned shall be responsible for maintaining and preserving the exhibit until there is a final disposition of the action or proceeding. All exhibit tags and other identifying markings or information concerning each exhibit shall remain in place and shall not be disturbed. Each exhibit shall be maintained intact and in the same condition as during trial. In the event further proceedings of any court having jurisdiction of the matter require the presence of the exhibit, the party or agency to whom it was returned shall promptly deliver the exhibit to the appropriate court, with notice to all parties.

(g) If, at the conclusion of the trial, counsel stipulates and the court approves, large and unwieldy exhibits can be represented by a photograph. The photograph shall be marked with the same information as the exhibit.

(h) After trial, drugs, weapons, and other dangerous or sensitive materials, including child pornography, that have been offered by the state in a criminal case shall be stored by law enforcement agencies. When transferring exhibits to the custody of law enforcement agencies, the clerk shall get a receipt acknowledging transfer of custody and file the receipt in the case file, noting on the exhibit list where and when transferred. (Adopted October 5, 2013, effective January 1, 2014.)

Compiler's notes. Rule 71 was repealed and reenacted by the order filed with the Supreme Court of Idaho on October 5, 2013. It repealed the previous rule 71 regarding

Physiological evidence, adopted March 23, 1990, effective July 1, 1990 and reenacted this rule 71 regarding Exhibits, effective January 1, 2014.

Rule 72. Discipline, removal, or involuntary retirement of a justice or judge.

(a) **Service of determination and recommendation.** Within seven (7) days of making a written determination that there is good cause for the

discipline, removal, or retirement of a judge or justice, the judicial council shall serve a copy thereof upon the judge or justice. The council shall also file a copy thereof with the Supreme Court, which copy shall be certified as true and correct by the chair of the council, its executive director, or its secretary.

(b) **Service — when required and how made.** Every document filed with the Supreme Court shall be served on the other party.

(1) Service upon a party represented by an attorney shall be made upon the attorney unless service upon the party is ordered by the Supreme Court. If the judicial council is not represented by an attorney, service upon it shall be made by serving the council's executive director. Service upon the person to be served shall be made by:

(A) handing it to the person; or

(B) leaving it at the person's office with the person in charge of the office or, if no one is in charge, in a conspicuous place in the office; or

(C) mailing it to the person's last known address, in which event service is complete upon mailing; or

(D) sending it by electronic means if the person consented in writing, in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(E) transmitting the copy by a facsimile machine process although this rule shall not require a facsimile machine to be maintained in the office of the person upon whom service is to be made.

(2) A certificate of service, signed by the attorney or person making service, shall be attached to every document filed with the Supreme Court. The certificate shall state the date and manner of service and the name and address of the person served.

(c) **Petition for review of determination or recommendation.** If the judge or justice desires to contest the determination or the recommendation, he or she must file a petition for review within fourteen (14) days of the date the determination is filed with the Supreme Court. Within seven (7) days thereafter, the petitioner must also file with the Supreme Court a certificate showing that a copy of the petition has been served upon the judicial council. The failure to file a petition within the time herein specified shall constitute a waiver of any objection to the council's determination and recommendation.

(d) **Contents of petition.**

(1) The petition shall be entitled, "In the Matter of Judge (judge's name)" or "In the Matter of Justice (justice's name)."

(2) The petition shall state whether the petitioner desires to contest the determination, the recommendation, or both.

(3) The petition shall state in short and plain terms each defense to an alleged violation of the Canons of Judicial Conduct.

(4) The petition shall admit or deny each finding of fact made by the judicial council. Any finding that is not denied shall be deemed admitted.

(5) The petition shall be verified by the petitioner.

(e) **Response to petition.** If the judicial council desires to file a written response to the petition, it may do so within fourteen (14) days after it is served with the petition. The failure to file a response shall not constitute an admission of the contents of the petition.

(f) **Request to present additional evidence.** Either party may request permission to present additional evidence to the Supreme Court. Within fourteen (14) days after the petition is filed, or within seven (7) days after the other party is granted permission to submit additional evidence, whichever is later, a party may file with the Supreme Court a request to present additional evidence.

(1) The request to present additional evidence shall include the following:

(A) the name, address, and telephone number of any person whose testimony is to be presented and a summary of the expected testimony;

(B) a copy of any documentary evidence to be presented;

(C) a statement of the reason such additional evidence was not presented to the judicial council during its proceedings.

(2) If the Supreme Court grants the request in whole or in part, the court may require that any additional testimony be presented by affidavit, by deposition, or to a special master appointed by the court who will make recommended findings of fact to the court.

(3) The party permitted to present additional testimony by deposition or to a special master shall file a transcript of such testimony with the Supreme Court. The Supreme Court shall specify the date by which such transcript must be filed, and the failure to file it timely without good cause shall constitute a waiver of the right to present such testimony.

(4) The Idaho Rules of Evidence shall apply to the admissibility of new evidence. All objections to testimony presented by deposition or to a special master shall be made during the examination. Objections to the admissibility of statements in an affidavit or to documents shall be made in writing within fourteen (14) days of the filing of such affidavit or document.

(g) **Filing of judicial council records.** Within twenty-eight (28) days of receipt of the petition, the judicial council shall file with the clerk of the Supreme Court the following:

(1) a copy of all documents, transcripts, and exhibits presented to the judicial council in connection with the proceedings that are the subject of the petition, and the original of any item that cannot reasonably be photocopied;

(2) a transcript of the proceedings before the judicial council; and

(3) a record of all other dispositions of complaints against the petitioner.

The judicial council shall notify the petitioner of the filing of the judicial council records.

(h) **Briefing.** Upon the filing of the judicial council records and of any additional evidence permitted by the Supreme Court, the clerk of the Supreme Court shall notify the parties of the briefing schedule.

(1) The petitioner's opening brief shall be filed within twenty-one (21) days, the answering brief by the judicial council shall be filed within fourteen (14) days of the service of the petitioner's brief, and the petitioner's reply brief, if any, shall be filed within seven (7) days of the service of the judicial council's brief.

(2) A party's brief shall include a table of contents with page references; a table of cases (arranged alphabetically) and other authorities, with references to the page numbers where they are cited; a concise statement of the facts; a list of the issues presented; an argument addressing the contentions of the petitioner with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon; and a conclusion stating the precise relief sought.

(3) No brief exceeding fifty pages, excluding addenda or exhibits, shall be filed without the consent of the Supreme Court.

(4) Each party shall file the original and six (6) copies of all briefs filed with the Supreme Court and shall serve two (2) copies thereof on the opposing party. The original of each brief shall be signed by the person submitting the brief.

(i) **Oral argument.** There shall be oral argument on the petition at such time and place scheduled by the Supreme Court, unless the parties stipulate to submit the matter upon the briefs and such stipulation is approved by order of the Supreme Court. The petitioner shall be entitled to open and close the argument.

(j) **Chief Justice shall be recused.** The Chief Justice shall be recused from the proceedings in the Supreme Court.

(k) **Decision by Supreme Court.** The Supreme Court shall review the record of the proceedings before the judicial council on the law and facts and shall order removal, discipline or retirement, as it finds just and proper, or wholly reject the recommendation. (Adopted August 29, 2013, effective November 1, 2013; amended October 11, 2013, effective November 1, 2013.)

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IDAHO RULES OF PROFESSIONAL CONDUCT

CLIENT LAWYER RELATIONSHIP

Rule 1.3: Diligence.

CASE NOTES

Diligent Representation.

Attorney originally represented client at trial and client pled guilty. Attorney was subsequently appointed to represent that client in a post-conviction hearing. During preparation for the post-conviction hearing, the attorney struck an ineffective representation of trial counsel claim from the original post-

conviction petition drawn up by the client. The attorney did not act with reasonable diligence, as required by this rule, and was involved in a conflict of interest, as prohibited by Idaho R. Prof. Conduct 1.7. Idaho State Bar v. Pangburn (in re Pangburn), — Idaho —, 296 P.3d 1080 (2013).

Rule 1.7: Conflict of interest: Current clients.

CASE NOTES

Conflict of Interest

Attorney originally represented client at trial and client pled guilty. Attorney was subsequently appointed to represent that client in a post-conviction hearing. During preparation for the post-conviction hearing, the attorney struck an ineffective representation of trial counsel claim from the original post-

conviction petition drawn up by the client. The attorney did not act with reasonable diligence, as required by Idaho R. Prof. Conduct 1.3, and was involved in a conflict of interest, as prohibited by this rule. Idaho State Bar v. Pangburn (in re Pangburn), — Idaho —, 296 P.3d 1080 (2013).

Rule 1.15: Safekeeping property.

CASE NOTES

Retaining Unearned Fees

Attorney who retained more than \$ 7,000 in unearned fees following his dismissal from representation of a criminal client, even after a dispute as to earned fees had been settled,

violated Idaho R. Prof. Conduct 1.16(d) and subsection (d) of this rule. Idaho State Bar v. Pangburn (in re Pangburn), — Idaho —, 296 P.3d 1080 (2013).

Rule 1.16: Declining or terminating representation.

JUDICIAL DECISIONS

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In a bankruptcy case, the proposal of debtor's counsel to deposit the debtors' funds in his general account, and his intention to have free access to those monies was inappropriate

under Idaho R. Prof. Conduct 1.15(b) and subsection (d) of this rule. In re Werry, — Bankr. —, 2011 Bankr. LEXIS 3292 (Aug. 26, 2011).

CASE NOTES**Retaining Unearned Fees**

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violated Idaho R. Prof. Conduct 1.15(d) and subsection (d) of this rule. *Idaho State Bar v. Pangburn* (in re Pangburn), — Idaho —, 296 P.3d 1080 (2013).

ADVOCATE**Rule 3.3: Candor toward the tribunal.****JUDICIAL DECISIONS****Ex Parte Hearing.**

In a hearing on a motion for a default judgment, the attorney for the movant has a duty under subsection (d) of this rule to inform the judge of any information that the

attorney may have that relates to a meritorious defense to the motion. *Maynard v. Nguyen*, 152 Idaho 724, 274 P.3d 589 (2011).

MAINTAINING THE INTEGRITY OF THE PROFESSION**Rule 8.4: Misconduct.**

Cited in: *Idaho State Bar v. Pangburn* (in re Pangburn), — Idaho —, 296 P.3d 1080 (2013).

IDAHO APPELLATE RULES

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11. Appealable judgments and orders.

110. Case files.

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Party to Action.

While there was no doubt that an attorney was aggrieved by a trial court's refusal to recognize the attorney's claimed lien, the im-

pediment to the attorney's appeal was the attorney's lack of party status. *Kinghorn v. Clay*, 153 Idaho 462, 283 P.3d 779 (2012).

Rule 7.1. Intervention.

Cited in: *Kinghorn v. Clay*, 153 Idaho 462, 283 P.3d 779 (2012).

Rule 11. Appealable judgments and orders.

An appeal as a matter of right may be taken to the Supreme Court from the following judgments and orders:

(a) **Civil Actions.** From the following judgments and orders of a district court in a civil action:

(1) Final judgments, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure including judgments of the district court granting or denying peremptory writs of mandate and prohibition.

(2) Decisions by the district court dismissing, affirming, reversing or remanding an appeal.

(3) Judgments made pursuant to a partial judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P.

(4) Any order or judgment of contempt.

(5) An order granting or refusing a new trial, including such orders which contain a conditional grant or denial of a new trial subject to additur and remittitur.

(6) An order granting or denying a motion for judgment notwithstanding the verdict.

(7) Any order made after final judgment including an order denying a motion to set aside a default judgment, but excluding an order granting a motion to set aside a default judgment.

(8) Any order appealable under the Uniform Arbitration Act, Title Seven, Chapter 9 of the Idaho Code.

(9) A district court order designating a person a vexatious litigant pursuant to Idaho Court Administrative Rule 59, in which case the notice of appeal may be filed with either the district court clerk or the Clerk of the Supreme Court.

(b) **Probate Proceedings.** From any interlocutory or final judgment or order made after final judgment of a district court in a probate proceeding,

whether original or appellate, which is or would be appealable from the magistrates division to the district court by statute or these rules.

(c) **Criminal Proceedings.** From the following judgments and orders of the district court in a criminal action, whether or not the trial court retains jurisdiction:

(1) Final judgments of conviction.

(2) An order granting or denying a withheld judgment on a verdict or plea of guilty.

(3) An order granting a motion to dismiss an information or complaint.

(4) Any order or judgment, whenever entered and however denominated, terminating a criminal action, provided that this provision shall not authorize a new trial in any case where the constitutional guarantee against double jeopardy would otherwise prevent a second trial.

(5) Any order, however denominated, reducing a charge of criminal conduct over the objection of the prosecutor.

(6) Any judgment imposing sentence after conviction, except a sentence imposing the death penalty which shall not be appealable until the death warrant is issued as provided by statute.

(7) An order granting a motion to suppress evidence.

(8) An order granting or denying a motion for new trial.

(9) Any order made after judgment affecting the substantial rights of the defendant or the state.

(10) Decisions by the district court on criminal appeals from a magistrate, either dismissing the appeal or affirming, reversing or remanding.

(11) Any order or judgment of contempt.

(d) **Administrative Proceedings — Industrial Commission.** From any final decision or order of the Industrial Commission or from any final decision or order upon rehearing or reconsideration by the administrative agency.

(e) **Administrative Proceedings — Public Utilities Commission.** From any decision or order of the Public Utilities Commission which is appealable to the Supreme Court by statute.

(f) **Administrative Proceedings — Judicial Review of Agency Decisions.** From any final decision or order of the district court on judicial review of an agency decision.

(g) **Cross-appeals and additional issues on appeal.** After an appeal has been filed from a judgment or order specified above in this rule, a timely cross-appeal may be filed from any interlocutory or final judgment order or decree. If no affirmative relief is sought by way of reversal, vacation or modification of the judgment, order or decree, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal. (Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended March 24, 1982, effective July 1, 1982; amended March 30, 1984, effective July 1, 1984; amended March 20, 1985, effective July 1, 1985; amended March 28, 1986, effective July 1, 1986; amended June 15, 1987, effective November 1, 1987;

amended March 20, 1991, effective July 1, 1991; amended March 9, 1999, effective July 1, 1999; amended January 30, 2001, effective July 1, 2001; amended March 21, 2007, effective July 1, 2007; amended March 29, 2010, effective July 1, 2010; amended November 20, 2012, effective January 1, 2013; amended June 20, 2013, effective July 1, 2013.)

JUDICIAL DECISIONS

ANALYSIS

Judgment Notwithstanding Verdict.
Jurisdiction of Court.

Judgment Notwithstanding Verdict.

Upon the filing of a notice of appeal by defendants of an order granting a motion for JNOV, which defendants had the right to file under this rule, the trial court was divested of jurisdiction except for actions under Idaho App. R. 13(b); hence, the trial court did not have the authority to enter a later judgment.

Mosell Equities, LLC v. Berryhill & Co., — Idaho —, 297 P.3d 232 (2013).

Jurisdiction of Court.

Supreme court had jurisdiction over the appeal of the trial court's granting of defendant's motion to suppress, even though the defendant never filed such a motion; both parties proceeded as if a motion had been filed, both briefed the nonexistent motion, and the trial court granted the motion. *State v. Koivu*, 152 Idaho 511, 272 P.3d 483 (2012).

Rule 11.2. Signing of notice of appeals, petitions, motions, briefs and other papers; sanctions.

JUDICIAL DECISIONS

ANALYSIS

Award Denied.
Sanctions.

Award Denied.

Idaho industrial special indemnity account was not entitled to appellate attorney fees under the rule, because an employer's appeal of a determination that it was liable for an employee's permanent total disability benefits was not brought for an improper purpose. *Tarbet v. J.R. Simplot Co.*, 151 Idaho 755, 264 P.3d 394 (2011).

Property owner acted reasonably on appeal in a zoning case, conceding arguments where a decision unfavorable to him was *res judicata* and by not making frivolous arguments.

Thus, although the owner lacked standing under § 10-1202 because the zoning of his land had not been changed, the county was not entitled to attorney fees on appeal. *Martin v. Smith*, — Idaho —, 296 P.3d 367 (2013).

Sanctions.

Where an irrigation district claimed attorney fees under § 12-121, which was inapplicable, rather than under § 12-117, which applied to it as a government taxing entity, the district was not awarded fees under either section; however, the district was entitled to fees under this rule because the appeal was without merit and appeared to be primarily for the purpose of harassment and annoyance. *Bettwieser v. New York Irrigation Dist.*, — Idaho —, 297 P.3d 1134 (2013).

Rule 12. Appeal by permission.

Cited in: *Rountree v. Boise Baseball, LLC*, — Idaho —, 296 P.3d 373 (2013).

Rule 12.3. Certification of a question of law from a United States court.**JUDICIAL DECISIONS****Properly Certified.**

Case concerning the assignability of a legal malpractice claim to a client's successor was properly certified from a federal district court because there was no controlling precedent to resolve the question, and there were public

policy issues on both sides of the legal question presented. *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani* (In re Order Certifying Question to Idaho Supreme Court), ___ Idaho ___, 293 P.3d 661 (2013).

RESEARCH REFERENCES

A.L.R. Construction and application of Uniform Certification of Questions of Law Act. 69 A.L.R.6th 415.

Rule 13. Stay of proceedings upon appeal or certification.**JUDICIAL DECISIONS****Stay upon Appeal.**

Upon the filing of a notice of appeal by defendants of an order granting a motion for JNOV, the trial court was divested of jurisdiction except to take the actions in Idaho App.

R. 13(b); hence, the trial court did not have the authority to enter a later judgment. *Mosell Equities, LLC v. Berryhill & Co.*, — Idaho —, 297 P.3d 232 (2013).

Rule 14. Time for filing appeals.

Cited in: *State v. Hansen*, — Idaho —, 303 P.3d 241 (2013).

Rule 19. Request for additional transcript or clerk's or agency's record — Payment.**CASE NOTES****Overinclusive Record.**

District court did not abuse its discretion in denying a request for deletion of part of the record on appeal; judicial economy favors an overinclusive record, rather than having to go

through the additional process of augmentation, if the appellate court finds the record lacking. *Rizzo v. State Farm Ins. Co.*, — Idaho —, 305 P.3d 519 (2013).

Rule 28. Preparation of clerk's or agency's record — Content and arrangement.

Cited in: *Rizzo v. State Farm Ins. Co.*, — Idaho —, 305 P.3d 519 (2013).

Rule 29. Settlement and filing of reporter's transcript and clerk's or agency's record.

Cited in: *Rizzo v. State Farm Ins. Co.*, — Idaho —, 305 P.3d 519 (2013).

Rule 30. Augmentation or deletions from transcript or record.

JUDICIAL DECISIONS

Need for Motion.

The court of appeals will not address the issue of a denied motion to augment the record made before the supreme court, absent some basis for renewing the motion. This may occur via a renewed motion, with new evidence to support it, filed with the court of

appeals or the presentation of refined, clarified, or expanded issues on appeal that demonstrates the need for additional records or transcripts, in effect renewing the motion. *State v. Cornelison*, — Idaho —, 302 P.3d 1066 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 228 (Idaho July 8, 2013).

Rule 35. Content and arrangement of briefs.

JUDICIAL DECISIONS

ANALYSIS

Argument.

— Failure to Support.

Failure to Raise Issue.

Failure to Support.

Argument.

Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by an appellate court. *Minor Miracle Prods., LLC v. Starkey*, 152 Idaho 333, 271 P.3d 1189 (2012).

— Failure to Support.

Buyers failed to comply with this rule with respect to their argument that the trial court abused its discretion by failing to grant their motion for a new trial; there was no citation to the record for many of the alleged facts, and there was neither argument nor supporting authority as to why any of the alleged facts constituted a ground for a new trial or why the district court abused its discretion in failing to grant the motion for a new trial. *Bolognese v. Forte*, 153 Idaho 857, 292 P.3d 248 (2012).

Failure to Raise Issue.

An appellant's failure to include in his initial appellate brief a fair statement of an issue presented for review results in waiver of the issue. This rule will be relaxed when the issue is supported by argument in appellant's

opening brief. Appellant may not raise an issue, including statute of limitations, in a reply brief. *Weisel v. Beaver Springs Owners Ass'n*, 152 Idaho 519, 272 P.3d 491 (2012).

Where a party requests attorney fees on appeal, but does not address the issue in the argument section of the party's brief, the court will not address the issue because the party has failed to comply with this rule. *Morrison v. Northwest Nazarene Univ.*, 152 Idaho 660, 273 P.3d 1253 (2012).

Failure to Support.

Property owner failed to provide any argument or authority to support his claim that the trial court abused its discretion by denying a motion to disqualify an irrigation district's counsel on grounds that the counsel and a member of the district board were father and son. Accordingly, the issue was waived on appeal. *Bettwieser v. New York Irrigation Dist.*, — Idaho —, 297 P.3d 1134 (2013).

Husband listed a claim of error in award of attorney fees in his appellate brief, but, because he did not provide any argument or authority on the issue, it could not be addressed on appeal. *Davidson v. Soelberg*, — Idaho —, 296 P.3d 433 (2013).

Cited in: *Enriquez v. Idaho Power Co.*, 152 Idaho 562, 272 P.3d 534 (2012); *Trotter v. Bank of N.Y. Mellon*, 152 Idaho 842, 275 P.3d 857, 2012 Ida. LEXIS 84 (2012); *Peterson v. Private Wilderness, LLC*, 152 Idaho 691, 273 P.3d 1284 (2012).

Rule 38. Opinions and remittiturs.**JUDICIAL DECISIONS****Purpose.**

This rule is merely the codification of the

law of the case doctrine. *State v. Hawkins*, — Idaho —, 305 P.3d 513 (2013).

Rule 40. Taxation of costs.**JUDICIAL DECISIONS****ANALYSIS****Applicability.**

Prevailing Party.

Applicability.

While this rule provides for the awarding of costs on appeal and Appellate Rule 41 specifies the procedure for requesting an award of attorney fees on appeal, neither rule provides the authority for awarding attorney fees. *Edwards v. Mortgage Elec. Registration Sys.*, — Idaho —, 300 P.3d 43 (2013).

Prevailing Party.

Because a physician and a clinic were the prevailing parties in a patient's appeal of an award of summary judgment in a medical malpractice action, they were awarded costs on appeal. *McCallister v. Dixon*, — Idaho —, 303 P.3d 578 (2013).

Cited in: *Aguilar v. Coonrod*, 151 Idaho 642, 262 P.3d 671 (2011).

Rule 41. Attorney fees on appeal.**JUDICIAL DECISIONS****In General.**

While Idaho Appellate Rule 40 provides for the awarding of costs on appeal and this rule specifies the procedure for requesting an award of attorney fees on appeal, neither rule

provides the authority for awarding attorney fees. *Edwards v. Mortgage Elec. Registration Sys.*, — Idaho —, 300 P.3d 43 (2013).

Cited in: *Aguilar v. Coonrod*, 151 Idaho 642, 262 P.3d 671 (2011).

IDAHO COURT OF APPEALS

Rule 101. Rules applicable to the Idaho Court of Appeals.

JUDICIAL DECISIONS

Cited in: State v. Cornelison, — Idaho —, 302 P.3d 1066 (2013).

Rule 108. Assignment of cases.

JUDICIAL DECISIONS

Scope of Review.

The court of appeals will not address the issue of a denied motion to augment the record made before the supreme court, absent some basis for renewing the motion. This may occur via a renewed motion, with new evidence to support it, filed with the court of

appeals or the presentation of refined, clarified, or expanded issues on appeal that demonstrates the need for additional records or transcripts, in effect renewing the motion. State v. Cornelison, — Idaho —, 302 P.3d 1066 (2013), review denied, — Idaho —, 2013 Ida. LEXIS 228 (Idaho July 8, 2013).

Rule 110. Case files.

All motions, petitions, briefs and other appellate documents, other than the initial notice of appeal, shall be filed with the Clerk of the Supreme Court as required by the Idaho Appellate Rules with the court heading of the Supreme Court of the State of Idaho as provided by Rule 6. In the event of an assignment of a case to the Court of Appeals, the title of the proceeding and the identifying number thereof shall not be changed except that the Clerk of the Supreme Court may add additional letters or other notations to the case number so as to identify the assignment of the case. All case files shall be maintained in the office of the Clerk of the Supreme Court. (Adopted April 17, 1981, effective July 1, 1981; amended June 20, 2013, effective July 1, 2013.)

